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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1930

No. 141-154
35055-35068

HILARY HALBERT, JR., DOROTHY HALBERT HUBBLE; MILDRED HALBERT, a Minor, by Hilary H. Halbert, Guardian *ad litem;* and FIFTY-ONE OTHERS, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Petitioners

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The Puyallup Valley Tribune

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No. 141

HILARY HALBERT JR, DOROTHY HALBERT HUBBLE, MILDRED HALBERT, a Minor, etc., *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 142

RICH HALBERT, a Minor, by Fred P. Halbert, Guardian *ad litem*, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA

No. 143

VERNON SIDNEY HALBERT, a Minor, by Benjamin F. Halbert, Guardian *ad litem*, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA

No. 144

SIDNEY E. HALBERT, a Minor, by Sidney Seth Halbert, Guardian *ad litem*, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA

No. 145

ROSE PEERS PICKERNOLL, MABEL PEERS WHITE and AMELIA PEERS ALDEN, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 146

LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, etc., *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 147

MARY BARICHIO PETIT and NORRIS PETIT, ELLIS A. PETIT, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 148

DEWEY BARICHIO and LEDA E. BARICHIO, ROMIE D. BARICHIO, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 149

EDNA MAY ELLIOTT, RUTH G. ELLIOTT, WILLIAM H. ELLIOTT, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 150

CHAS. G. ELLIOTT JR, ANNA MARIE ELLIOTT, HENRY ELLIOTT, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 151

AGNES RUBENS, LOUISE HENRY PETERSON, MARY HENRY HAGEN, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 152

VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 153

LIZZIE ROLFSON, ALVIN SMITH, EUGENE SMITH, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

No. 154

MARY FRANCIS PROVOE, LAURA M. BROWN, FRANK M. PROVOE, *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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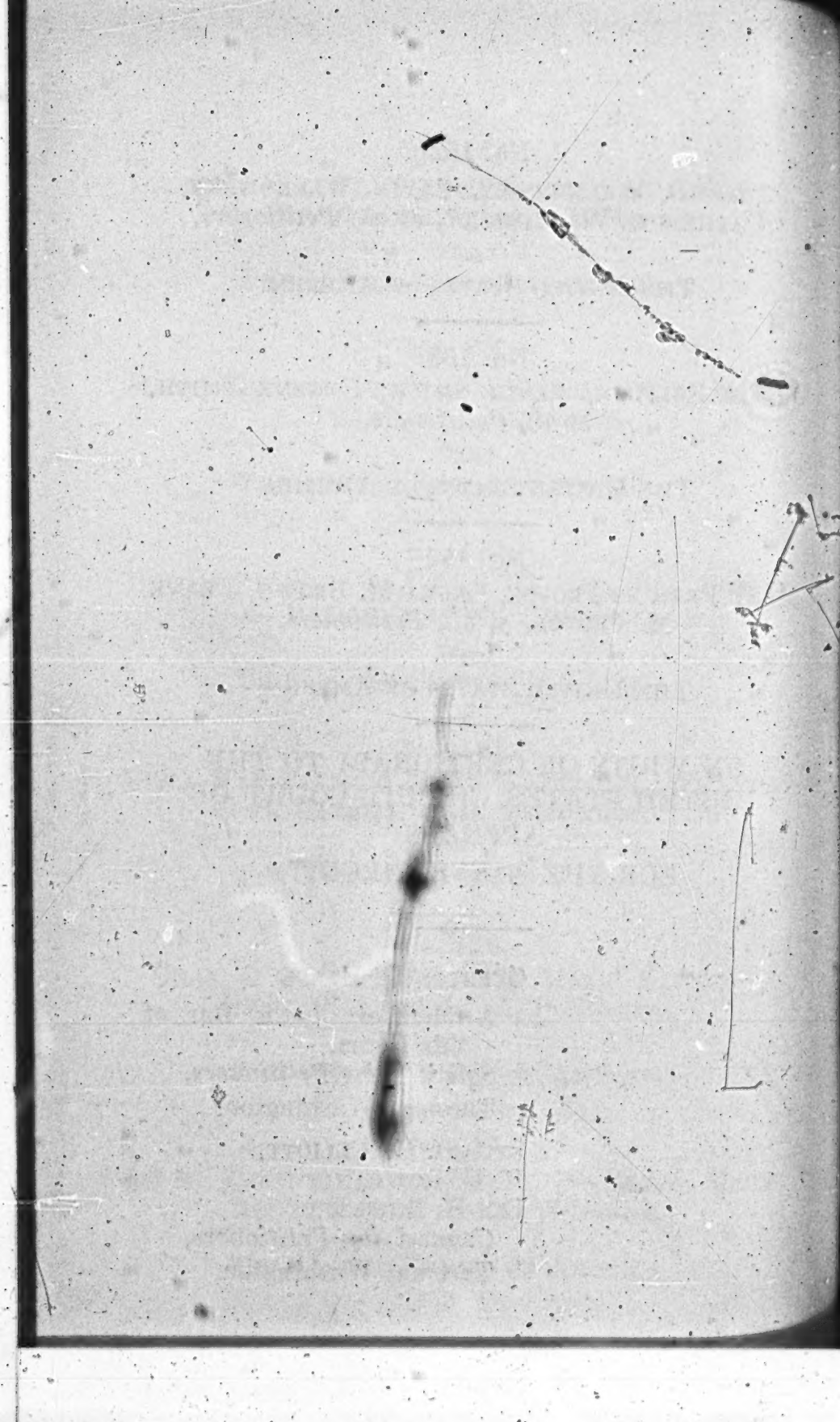

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IN THE

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OCTOBER TERM, 1930.

Nos. 141 to 154

HILARY HALBERT, JR., DOROTHY HALBERT HUBBLE, MILDRED HALBERT, a Minor, by Hilary H. Halbert, Guardian *ad litem;* and FIFTY-ONE OTHERS, *Petitioners,*

vs

UNITED STATES OF AMERICA, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

I.

OPINIONS OF COURTS BELOW

The opinion of the District Court is printed in the Record at pages 285 to 375, and is not reported in the Federal Reporter. The opinions of the Circuit Court of Appeals are printed in the Record at pages 633 to 699, and in the Federal Reporter in

38 Federal (2nd) pages 795 to 806. There are four opinions of the Circuit of Appeals:

United States vs. Halbert et al, and eleven other cases, No. 5922, 38 Fed. (2nd) 795, and page 633 of the Record.

United States vs. Provoe et al., No. 5922, 38 Fed. (2nd) 799 and page 653 of the Record.

United States vs. Walkowsky et al., No. 5922, 38 Fed. (2nd) 805, and page 646 of the Record.

United States vs. Rolfson et al., No. 5922, 38 Fed. (2nd) 806, and page 650 of the Record.

II.

STATEMENT OF JURISDICTIONAL GROUNDS

These cases were begun in the United States District Court for the Western District of Washington, Southern Division, under and by virtue of the Act of August 15, 1894, (28 Stat. L. 305) as amended by the Act of February 6, 1901, (31 Stat. L. 760) and the Act of March 3, 1911, (36 Stat. L. 1167, 25 U. S. C. A., par. 345) which provides that:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any

allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper district court of the United States, etc."

The following cases sustain the jurisdiction of this Court under the above statute:

Leecy v. United States, 190 Fed. 289. (Appeal dismissed, 232 U. S. 731.)

Sloan v. United States, 118 Fed. 283. (Appeal dismissed, 193 U. S. 614).

Morrison v. Work, 266 U. S. 481.

Hy-yu-tse-mil-kin v. Smith, 119 Fed. 114, and 194 U. S. 401.

Payne v. United States, 264 U. S. 446, 284 Fed. 827.

The jurisdictional grounds are pleaded in each case. (R. 2, 20, 38, 56, 92, 109, 129, 150, 169, 190, 209, 227, 248, 267), and are admitted by the respondent. (R. 9, 27, 45, 63, 99, 117, 136, 158, 177, 198, 216, 235, 256 and 274).

The cases were all consolidated for the purposes of trial and appeal. (R. 376).

After a hearing before the trial court, the petitioners were allotted and at the same time seven of the plaintiffs were denied allotments. The respondent, the United States, appealed to the Circuit Court of Appeals all the cases in which allotments were granted. The Circuit Court of Appeals reversed the United States District Court in the cases involving petitioners. (R. 644). Petitioners filed a petition for rehearing, which on the 31st day of March, 1930, was denied. (R. 685).

Writs of certiorari were granted in these cases on October 13, 1930. (United States Supreme Court Advance Opinions 1930-31, No. 1, page 6) (R. 689 to 692, inclusive).

This Court has jurisdiction to review these Cases under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (43 Stat. 936).

The judgments of the Circuit Court of Appeals in all of the above cases were signed on February 24, 1930. The judgment of the Circuit Court of Appeals in each case may be found on the page number opposite the case number in the table below:

U. S. Supreme Court Number	District Court Number	Page of Record
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142	300E	671
143	301E	672
144	302E	673
145	307E	675
146	312E	676
147	320E	677
148	321E	678
149	324E	679
150	325E	680
151	326E	681
152	315E	682
153	314E	683
154	309E	684

All the above cases were combined in the Circuit Court of Appeals (9th Circuit) as Number 5922.

III.

STATEMENT OF THE CASE

The cases, in which writs of review have been granted and which are now before this Court, were begun in the United States District Court for the Western District of Washington, Southern Division. The reservation concerned is the Quinaielt Reservation in Grays Harbor County, Washington.

After a hearing before the trial court, the petitioners were allotted and at the same time seven of the plaintiffs were denied allotments. The respondent, the United States, appealed all the cases in which allotments were granted. The plaintiffs who were not allotted did not appeal. (Opinion of Trial Court, R. 285 to 375). The Circuit Court of Appeals granted the allotment of Lizzie Rolfson personally (R. 683) and of Archie Pellard conditionally (R. 674). The Circuit Court of Appeals reversed the United States District Court in the cases involving these petitioners. (R. 644, 649, 653, 669). Petitioners filed a petition for rehearing, which on the 31st day of March, 1930, was denied. (R. 685). All the petitioners are Indians.

Homes of Petitioners

All of the petitioners live adjacent to the Pacific Ocean in the region between the Quinaielt Reservation and the Columbia River. A considerable number live at Dahlia, near the mouth of the Columbia River, strictly an Indian fishing village; (R. 485, 488, 422, 425, 383, 384, 388, 394, 414, 417, 421, 548, 511, 514, 515); a small group lives at the little settlement of Oysterville (R. 495-542 etc.), and a larger group at the little settlement Bay Center on the Pacific Ocean. Bay Center, particularly, is still in a large degree an Indian settlement. (R. 569 to 574. 545 to 558, 495). One petitioner

lives just outside the Quinaielt Reservation at Moclips, the home of several members of the Quinaielt Council. (R. 597, 413). One lives on the shore of Quinaielt Lake (R. 398), which lake itself is within the reservation. Another group of petitioners lives at Oakville on the little Chehalis Reservation thirty miles east of Grays Harbor. Still another group of petitioners live in the town of Hoquiam on Grays Harbor, thirty miles from the Quinaielt Reservation. (R. 385, 393). Hoquiam would probably be called a white community at the present time. However, it was once an Indian village, (R. 392, 394), (Handbook of American Indians, Part I, p. 569) and the Quinaielt Indian Agency is now located there. (R. 382). Furthermore, many Indians live in Hoquiam. Thus it can be seen that the petitioners have not left the Indian country. A great many of the petitioners are fishermen (R. 398, 488, 508, 571, 572), and their mode of living is no different than that of the group which lives on the Quinaielt Reservation. (R. 388, 414). The petitioners, Alvin Smith and Eugene Smith (Case No. 153) may not come within the above general rule. They are working now outside of this region, but they lived with their mother, Lizzie Rolfson, on Grays Harbor all of their lives until Alvin Smith went away to the war. Referring to all petitioners, the trial court makes a general finding to this effect:

"They still cling together at and about the old haunts of the former tribal organization and are therefore tribes within the meaning of the Executive Order and the Act of March 1911." (R. 330).

The Indian situation in Western Washington is in many respects different from that of any other part of the United States (R. 500). Because of the uninhabitable condition of the Reservation none of the Indians for whom it was set aside have been placed upon it. Only a small group lives upon it or has ever lived upon it. In contrast with the Indians of many other parts, the Indians of this region have been by necessity self-supporting. A small group lives at LaPush (150 to 200), a few at the mouths of the Hoh (62) and Queets Rivers (62), another group at Taholah (150 to 200), at the mouth of the Quinaielt, but others live in towns and Indian setlements in Southwestern Washington. Most of these Indians are engaged in fishing or oyster gathering, but others work for the white man in lumber camps and saw mills.

Geographical and Historical Sketch

A reference to the geography and Indian history of Western Washington will aid greatly in understanding these cases. We believe the Circuit Court of Appeals in reversing these cases complete-

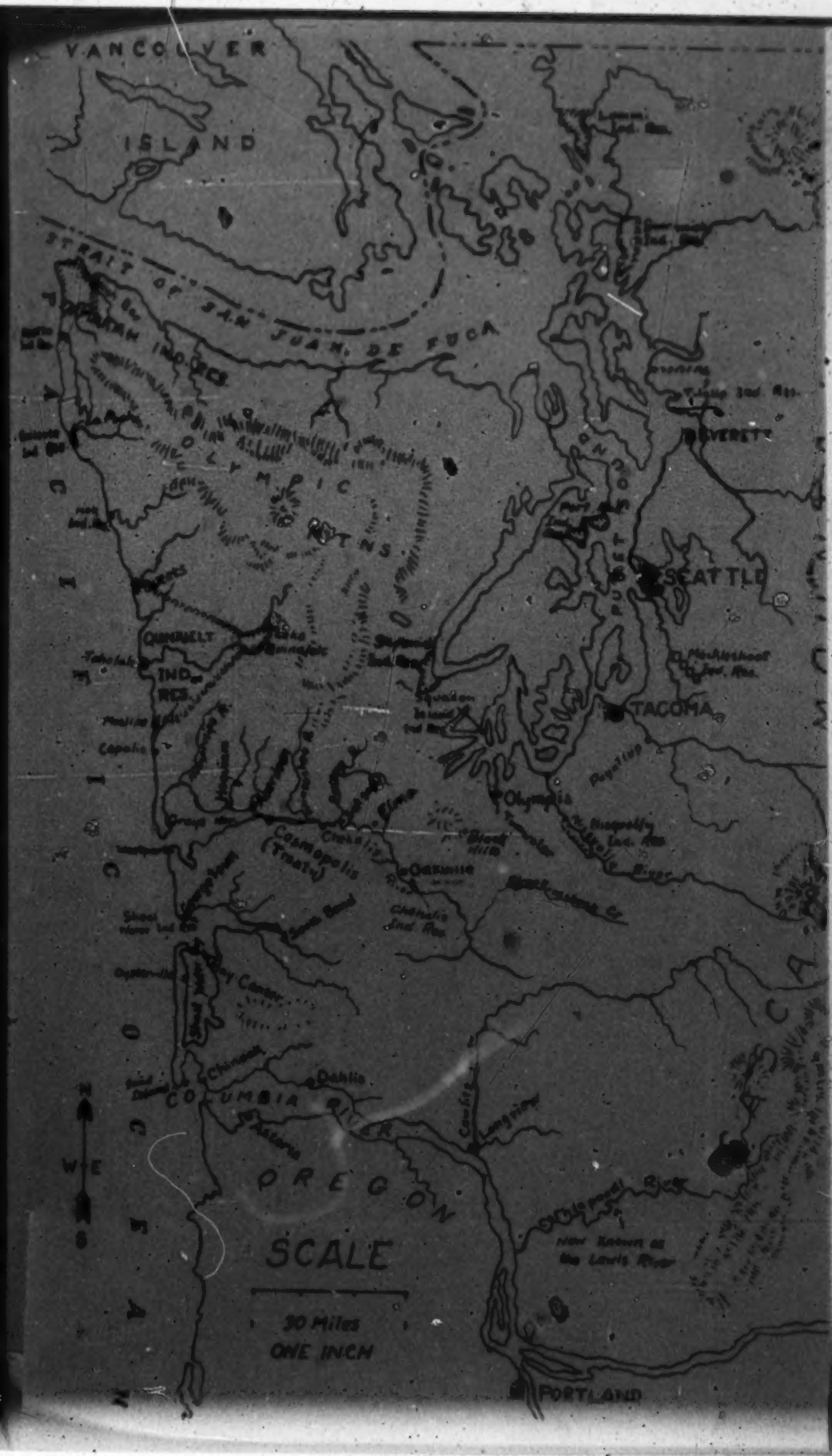
ly overlooked the peculiar physical condition of the Quiniaelt Indian Reservation and the history of these Indians as affected by that condition. The record is very clear as to the physical condition of the Quiniaelt Indian Reservation. The reservation is a heavily timbered area. Residence thereon is not possible until the land is cleared and fit for cultivation. (R. 383, 404, 426, 446, 500). The record furthermore contains so much testimony as to the history of these Indians, the dealings of the government with them, and of their past and present mode of living that it should not be necessary to go outside of it for the purposes of this sketch. However, if for the sake of completeness, we should go outside of the record, and make statements which are matters of common knowledge, we expressly request respondent to correct us in its brief if it is believed that any of these statements are inaccurate.

We are including herein a sketch map of Western Washington, for the purposes of illustration only, showing (1) the principal physical features of the region, (2) the location of the various Indian Reservations, (3) the locations of the homes of the petitioners, and a number of other places and physical features referred to in the record. This map was copied almost entirely from the official map of the Department of the Interior for

the year 1924 and in addition thereto is borne out by the record in the case.

The country with which we are concerned in these cases is that part of the State of Washington which lies between the Makah Indian Reservation or the Straits of Juan de Fuca on the north and the Columbia River on the south. Excepting the Olympic mountains, with which we are not concerned, the area is not mountainous. There are ranges of hills, probably the greater part is upland or hilly, but there are many valleys and swampy river bottoms through which flow rivers and streams of considerable size and volume, the principal of which is the Chehalis, along which river or its tributaries a number of the petitioners reside. It is a rainy country.

When the white men first came to this region they found it covered with forests, almost impenetrable because of the heavy underbrush. Travel through this humid jungle-like country was exceedingly difficult except along rivers, streams and ocean beaches. Most of the early travel was by canoe. (Swan's "Northwest Coast"). Wild game was not particularly plentiful and, because of the thick underbrush, was difficult to capture. But Nature had placed an abundance of fish in the streams, rivers and bays, so when these first white men came they found the region inhabited by a


VANCOUVER
ISLAND
STRAIT OF SAN JUAN DE FUCA
OLYMPIC
MOUNTAINS
EVERETT
SEATTLE
TACOMA
QUINAULT
INDIAN RES.
Olympia
Cosmopolis
(Treaty)
Oakville
Chehalis
Chehalis Ind. Res.
Shoalwater Ind. Res.
Grays Harbor
Chinook
Oahlio
COLUMBIA RIVER
Astoria
Cowlitz
Longview
OREGON
Now known as the Lewis River
PORTLAND
SCALE
30 Miles
ONE INCH
N
W
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people who were fish eaters and "who drew their subsistence almost wholly from the water."

Because of the difficulty of travel, these inhabitants were not united under one leadership. In fact there was no real tribal organization at all comparable to that found in many other parts of the United States. (R. 547, 548, 554). A small village, or a group of families, or a single "family house" (Swan's Northwest Coast) at the mouth of this or that river or at the confluence of two streams was about the only form of tribal organization. It is true that the Indians of one locality went by a name to distinguish themselves from those who lived in other localities, usually taking the name of the river along which they lived. It is also true that those of one district in some instances spoke a somewhat different dialect from those of other districts, although the racial group or strain was Chehalis. (R. 547). (Handbook of American Indians, Part 1, p. 241). Individual Indians or medicine men sometimes called themselves chiefs, but it is almost certain that their sovereignty rarely, if ever, extended beyond the confines of their villages.

The Quileutes who lived to the north of what is now the Quinaielt Reservation belong to a different racial stock from those further south and they were much more warlike. (Handbook of American Indians, Part 2, p. 340) (R. 548). But many of the

Indians who lived on and around the Quinaielt River and many who lived south of there were accustomed to travel yearly to the Columbia River to fish. (R. 414, 417, 388, 548, 556, 508, 426, 421). This custom had probably gone on for generations and, as a result these Indians had more or less intermingled, and there is little by which to differentiate them. This affiliation was only of a general nature. There were, it is clear, differences between the more distant of these remnant tribes. (R. 419, 421). One witness at the trial testified that the Indians who lived 50 or 60 miles up the Chehalis River spoke a somewhat different language or dialect from that of the Indians near the mouth of the river (R. 419); another said their methods of fishing were different. Other witnesses testified, however, that they were more or less intermingled and that the names Upper Chehalis and Lower Chehalis were given by the whites for the sake of convenience. (R. 502, 557).

Although Article 5 of the Quinaielt Treaty (12 Stat. 971, Kappler's Indian Affairs, Laws and Treaties, 2nd Ed., Vol. II, p. 917) promised that $2500.00 should be appropriated for the purpose of placing the Indians on the reservation, there is nothing in the records to show that this sum was ever appropriated. Probably because of the Indian Wars, followed soon after by the Civil War, the matter was dropped. Certainly because of the

uninhabitable condition of the reservation, all the witnesses having testified that the reservation was not habitable until the land is cleared and made fit for cultivation, (Entire Record), the Indians for whom the Quinaielt Reservation was set aside were never placed upon it. The Interior Department, realizing that the Indians would starve to death on the uncleared reservation, or be a heavy expense to the government, was content to let them remain in their old haunts and to continue to make such living as they could by fishing or oyster gathering or by working for the white man. It might be added that this policy of the Department forced the Indians to live among the whites who in all cases have moved in and around them, and has naturally brought about a greater amount of intermarriage of whites and Indians than there otherwise would have been. (R. 422, 417).

The Indian Agency was for some years at Tacoma, Washington, later at Taholah, Washington, and for the last eight years at Hoquiam, Washington. (R. 459, 382, 399, 503). Since the days of the Quinaielt Treaty, which we will discuss below under the head of "Dealings of the Government With the Indians", the Indians of Southwest Washington, having no tribal organization, have more or less affiliated. (R. 325, 548). It is said that the Chinooks, the Shoalwater Bay, the Upper and Lower Chehalis, and to a somewhat less extent the

Cowlitz, are no longer distinct groups of Indians, that they have intermarried and intermingled to a much greater extent than they did before the coming of the whites. (R. 554). The statement that there is no tribal organization deserves some qualification. While only about 6 Indians of the 1400 allotted Indians live upon their allotments, about 150 live on the Quiniaelt Reservation. (R. 466). Almost all of these 150 live at the two fishing villages of Taholah and Queets (R. 383, 466). Most of them have fishing rights on the Quiniaelt River and make their living by fishing. These Indians, who because of their paramount fishing rights on the Quinaielt River are able to live on the reservation, have something akin to a tribal organization. It is under the supervision of the Indian Agent and all the tribal meetings are called by the Agent. It and Shoalwater Bay organization are described as more business organizations than tribal organizations. (R. 432, 554). At the same time there are 1000 other Indians who do not reside nor ever have resided upon the reservation although allotted thereon, who take no regular part in the affairs of these reservation Indians.

It should be mentioned that the very first visitors to Shoalwater Bay and the Columbia River described the Chinook and Shoalwater bands as being very numerous. (Journal of Lewis and Clark), (Adventures on the Columbia River by Ross Cox

1805, p. 156). In 1855, fifty years later, they are described as remnant bands of once powerful peoples, reduced to a sixth or less of their original numbers. (Swan's Three Years at Shoalwater Bay, p. 110, also p. 210). (R. 297, bottom of page). Whether it was the diseases, measles, smallpox, etc., brought by the white man that brought about the wholesale destruction of these people or contributed to it is not certain. It appears that the region north of Grays Harbor and particularly north of the now Quinaielt Reservation was less affected. North of Grays Harbor there are no harbors into which the early ships could sail and the region north of the reservation is practically untouched by the white men today.

Dealings of the Government With the Indians

It is well known to persons conversant with the history of the states of Washington and Oregon that on March 17, 1853, President Pierce appointed Isaac I. Stevens governor of the then Washington Territory and on November 25, 1853, he arrived in Washington Territory and established headquarters at Olympia. Among his other duties he was delegated to call meetings of the various tribes and bands of Indians in Washington Territory and make treaties with them for and upon behalf of the United States. (Life of Isaac I. Stevens by

Hazard Stevens, Vol. I, p. 448 et seq. Vol II, p. 1 et seq.).

Pursuant to this he called together the various tribes and bands of Indians and held councils with them. In Western Washington he effected the following treaties:

The Treaty with the Makah (12 Stat. L. 939); the Treaty with the Nisqually, Puyallup, etc., known as the Treaty of Medicine Creek (10 Stat. L. 1132); the Treaty with the Dwamish, Suquamish, etc., known as the Muckleteoh or Point Elliott Treaty (12 Stat. L. 927); the Treaty with the Sklallam, known as the Point No Point Treaty, (12 Stat. L. 933); and the Treaty with the Quinaielts, etc., (12 Stat. L. 971).

It was the intention of the Governor to include all Indian tribes of Western Washington and to provide for them in these treaties, and in accordance with such intention, Governor Stevens called together in council various associated and affiliated bands and tribes for the purpose of making treaties. He did not deal with each individual band but grouped them together into divisions in accordance with racial stock, language, custom, habits, affiliations, etc., and accordingly he summoned in council at the present site of Cosmopolis in the Chehalis River valley, on the 25th of February, 1855, 350 representatives of the following

tribes: Quinaielts, Chinooks, Upper and Lower Chehalis and Cowlitz. (Swan's Three Years at Shoalwater Bay, p. 337). (R. 386, 394). A census of the tribes represented at Cosmopolis showed the following members:

Lower Chehalis	217
Upper Chehalis	216
Quiniaelts	158
Chinooks	112
Cowlitz	140
Total	843

TERRITORY CLAIMED BY INDIANS AT COSMOPOLIS

It was the purpose of the Governor to have these various tribes cede their territory to the United States and, in exchange therefor, to create a large reservation for them somewhere between Cape Flattery and Grays Harbor, where they could all be placed. (Swan's Three Years at Shoalwater Bay, p. 344). The territory to be ceded commenced on the Pacific Coast at the divide between the Quaitso and the Hoh Rivers; thence east between the same along the line of the Puillachynte to the summit of the Coast Range; thence south along the line of Chem-a-kum and Skokomish tribes to the fork of the Satsop River; thence southeasterly along the line ceded by the Nisqually Indians to the

summit of the Black Hills and across the same to the banks of the Skookumchuck Creek; thence up said creek to the summit of the Cascade Range; thence along the range to the divide between the waters of the Cowlitz and the Cathlapoodl (Lewis) Rivers; thence southwesterly to the line of the Upper Chinook to the Columbia River and down the river to the sea.

Thus it appears that the proposal was to include all the lands upon the Pacific Coast from the Straits of San Juan de Fuca on the north, the Columbia River on the south, the Pacific Ocean on the west,, and the Cascade Mountains on the east, excluding, however, the land in the Puget Sound Basin which was covered by other treaties cited herein.

The Governor was eminently successful with the Indians of Northwest Washington, as was evidenced by the Makah or Neah Bay Treaties, and the Muckleteoh or Point Elliott Treaties. He also succeeded in making treaties with bands of Indians in Central Puget Sound, as is evidenced by the Treaty of Medicine Creek.

In his attempt to negotiate a treaty at Cosmopolis for the Southwestern Washington group above mentioned, he encountered unexpected obstacles and trouble. At first good progress was made, but finally, owing to some of the head men becoming intoxicated, it broke up in a row. (Swan's

Three Years at Shoalwater Bay, pp. 346 to 350), and he felt compelled to at least temporarily admit failure. It is said by James G. Swan, who was present at the Cosmopolis meeting, in his book "The Northwest Coast" that the Chinooks and other Indians of Southwestern Washington objected to being placed on a reservation "up north". "for the people up there were their enemies and they would fight and would all be killed." As a result thereof, many Indian tribes or bands were not named in the Quinaielt Treaty, so-called, and were never recompensed for their lands taken. The Indians finally signing the treaty at a later date were the Quinaielt Indians and the Quillehute Indians, the Quillehutes apparently having been taken in at a later date with the Quinaielts. They were apparently not contemplated at the meeting or treaty of Cosmopolis.

By the terms of the Quinaielt Treaty, a vast territory was ceded to the United States and a reservation of about 10,000 acres around the mouth of the Quinaielt River was reserved and established for the Quinaielt tribe.

The Indians who assembled at Cosmopolis, called there by Governor Stevens, were all fish-eating tribes of the Pacific Coast, subsisting principally on salmon, sturgeon, oysters and other sea foods. (Solicitor's opinion, R. 295-326). Their

languages were dialects of the Chehalis and they belonged to the Chehalis branch of the Salishan family. (Handbook of American Indians, Vol. II, page 418). These tribes were sought to be bound together by Governor Stevens in one treaty because of their many interests in common, among which were the fisheries between the mouth of the Quinaielt River and the Columbia River, and because they were mere remnants of once populous tribes, their numbers being so small that it would be uneconomical to provide a separate reservation for each tribe. (R. Exhibit No. 9).

That the Governor had accurately classified and grouped these Indians is borne out by the text of the Handbook of American Indians, Bureau of American Ethnology, Part 2, page 418, where it is stated under the head of Salishan Family:

> "Chehalis Group—embraced six dialects which show considerable variation. These are the Quinaielt and Quaitso of N. W. Washington, the Humptulip of the northern part of Grays Harbor, the Lower Chehalis of Grays Harbor and Shoalwater Bay, the Satsop east and northeast of Grays Harbor, the Upper Chehalis east of Shoalwater Bay, and the Cowlitz on the river of that name southward to the Columbia."

In Volume I of the same publication, p. 272,

it states that as early as 1855 the Chinook Indians were much mixed with the Chehalis, and that they have since completely merged, their language having become extinct.

This book was published by the Smithsonian Institution in 1910 and is the recognized outstanding authority on American Indians.

Although the meeting at Cosmopolis failed, Governor Stevens did not abandon his hope and intention, and the intention of the Indian Department to place the fish-eating Indians of the Pacific Coast on a reservation large enough to provide for their necessities, but such negotiations were stopped by the problems of the Yakima War which had broken out and demanded the undivided attention of the Government. In this war the Puget Sound Indians and various tribes of Indians east of the Cascade Mountains, both in Washington and Oregon, participated, and the Civil War was in the offing. The enlistment of the Governor in the Civil War took him away from the West and he was slain in an early engagement. (Life of Stevens, Vol. II, p. 485). All negotiations in reference to caring for the Indians of Washington were postponed until after the Civil War, when they were again resumed.

In the meantime Congress passed the Act of March 3, 1871, R. S. 2079, Appendix B), prohibit-

ing further treaties with Indian tribes and declaring that they should no longer be recognized as independent nations or tribes. The Interior Department and the Government agencies thereupon, in order to keep faith with the Indians of Southwestern Washington, contemplated in the original meeting at Cosmopolis, recommended and secured an executive order dated November 4, 1873, under the authority conferred on the President by Article 6 of the Quinaielt Treaty of 1855 and 1856, to consolidate the Quinaielt and Quillehute tribes and bands with other friendly tribes or bands. This executive order enlarged the Quinaielt Reservation to provide for these Indians and the fish-eating Indians of the Pacific Coast and other Indians in that locality. The reservation was thus enlarged from the original 10,000 acres to 224,000 acres and was thereupon set apart for the use of the Quinaielts, Quillehutes, Hoh and Quit and other tribes of fish-eating Indians on the Pacific Coast. (R. 436 and Plaintiff's Exhibit No. 9).

The Chehalis Reservation near Oakville has not been shown on the Department's maps in recent years. In 1864 it was set aside by the Secretary of the Interior. However, sometime after the promulgation of the Executive Order of November 4, 1873, it appears that it was abandoned. In the Handbook of American Indians, Vol. II, page 387, it is said:

Chehalis Reservation:

"Order of the Secretary of the Interior, July 8, 1864; Executive Order, Oct. 1, 1886. 471 acres set aside for school purposes; the residue, 3,753.63 acres, was restored to the public domain for Indian homestead entry. 36 Indians made homestead selections, covering all the land."

Respondent does not suggest that this reservation has any bearing on the issues in these cases. References to the Chehalis reservation may be found at the following record citations: (R. 441, 496, 538, 539).

Nothing further was done until the passage of the General Allotment Act of 1887. The question of allotting the reservation was taken up, and finally in 1905 the work began, and allotments were made to a large number of fish eating Indians on the Pa- Upper and Lower Chehalis, Chinook and other associated tribes, many of whom are the ancestors of these petitioners (R. 425, 437, 443, 503, 534, 502, 602). These allotments included members of all those tribes and bands which had gathered at Cosmopolis in 1855 in answer to the summons of Governor Stevens and they take in all the settlements around the Quinaielt River, Grays Harbor, Shoalwater Bay and some around the Columbia River. (R. 425-443).

On March 4, 1911, a special allotment statute was passed by Congress. This provided:

> "That the Secretary of the Interior be, and is hereby authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-fifth, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes;
>
> *Provided*, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed." (36 Stat. 1345) (Appendix "F").

This was the last legislation relative to allotment of the reservation.

MEANING OF ACT OF MARCH 4, 1911, DOUBTFUL

However, the local Indian Office and many Indians felt that the Act of March 4, 1911 (Appendix F) was not as clear as it might be in the expression "other Indians in Washington who are affiliated

with the Quinaielt and Quileute tribes in the Treaty of July 1, 1855, and January 25, 1856". They feared that it might some day be used to deprive the Indians, for whom the reservation was set aside, from their rights to allotment and might upset the entire previous policy of allotting the Quinaielt Reservation. As a result House Bill 22868 was introduced on April 2, 1912, to clear up the matter. (R. 320). The Indian Office at Washington thereupon gave its opinion January 4, 1913, (R. 315) which dispelled these fears and was so far satisfactory that House Bill 22868 was dropped. The relevant part of that opinion read as follows:

"The question may be seriously considered at this time whether the Act of March 4, 1911, supra, was necessary. That is, whether authority did not already exist under the treaties mentioned and the Executive Order of November 4, 1873, to allot on the Quinaielt Reservation Indians of the tribes specifically mentioned in the Act of March 4, 1911. It is not seen, therefore, how this Act can be construed or regarded as in abrogation of or placing any limitation on the rights of various so-called fish-eating Indians of the Pacific Coast to allotments on the Quinaielt Reservation. The act should be read in conjunction with the prior treaties and the

executive orders rather than using it as a basis for excluding from allotment on the Quinaielt Reservation members of the fish-eating tribes not specifically named in its provisions or who cannot be shown as clearly coming within the phrase 'or other tribes of Indians in Washington, who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's (300) correction), 1856'."

* * *

"House Bill 22868, introduced April 4, 1912, but which has not yet been referred to the Department for report so far as this Office has been advised, is designed to authorize allotments on the Quinaielt Reservation to the unallotted Indians of the Clallam, Cowlitz, Squaxon Island, Port Gamble, Hoh, Ozette, Quileute and other fish-eating Indians in the State of Washington. In view of the treaties, executive orders and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary."

We will point out in the argument that, while the trial court held that the Indians of Southwestern Washington were affiliated with the Quinaielts

and Quileutes in the Treaty of July 1, 1855, and January 25, 1856, because of their part in the historically famous prior negotiations of February 25, 1855, it is unnecessary for this court to decide that question.

Opinion of Solicitor for Department of The Interior

The most important evidenciary document in these cases is the opinion of Alexander Vogelsang, Solicitor for the Interior Department (R. 295 to 326). This is in the form of a letter written September 12, 1916. Many Indians from all parts of Western Washington, including many belonging to the Puget Sound tribes who had been provided with large reservations, sought allotments on the Quinaielt reservation. The Solicitor for the Department examined all the correspondence relevant to the question and held that many of those tribes were not entitled to allotment. His conclusion is that only the Indians of those tribes or bands from the Makah Reservation on the north to the mouth of the Columbia River, and tribes affiliated with them are entitled to allotment (R. 324, 325). The trial court sets out this opinion of the solicitor in full (R. 295-326), and his analysis of it begins on page 326 of the Record.

History of Allotment of Quinaielt Reservation

Allotments on the Quinaielt Indian Reserva-

tion in Washington began in 1905 under the General Allotment Act of 1887. The first roll of 119 names was submitted in 1907, the second of 327 names in 1908, and the third of 300 names in 1910. Thus, 746 Indians were allotted on the Quinaielt Reservation before the passage of the Act of March 4, 1911 (See Appendix "F") (R. 437).

In 1908 the superintendent of the Quinaielt Indian Reservation accompanied by Commissioner of Indian Affairs made an investigation of the situation on the Quinaielt Reservation, and later the Superintendent, Commissioner of Indian Affairs and the Secretaryof the Interior, Mr. Garfield, held a conference in Washington when it was decided that, owing to the peculiar situation of the Quiniaelt Reservation, the scattered fish-eating Indians in Southwestern Washington should be recognized and allotted without residence (R. 499). Carrying out this policy, the Quinaielt and associated Indians living at Shoalwater Bay were allotted on the Quiniaelt Reservation in 1906 or 1908 to the extent of over 100, without applications. (R. 494). Trust patents were issued to them and the Superintendent of the Quiniaelt Reservation was sent to Shoalwater Bay to advise the Indians to accept their patents and to tell them that residence on the reservation would not be required of them (R. 494). Most of these Indians never resided on any

reservation. Among these allotted at that time are included the entire settlement at Bay Center, sixty miles from the Quiniaelt Reservation (R. 425, 426), most of who are ancestors and close relatives of petitioners (R. 542, 551, 553, 569, 571, 572, 575).

Since the above schedules were approved, 746 or 747 additional Indians have been allotted and such allotments approved by the Secretary. These allotments were made under the Act of March 4, 1911. Prior to the passage of the act, and subsequent therto, many Quiniaelts, Lower Chehalis, Upper Chehalis, Chinooks and some Cowlitz were allotted on the Quinaielt Reservation (R. 425, 437, 444, 503, 534, 602, 411). Of all the names on these schedules, only six ever lived on their allotment. (R. 446). Of all the 1400 Indians allotted, only 150 live on the Reservation (R. 466), these being at the fishing villages of Taholah and Queets (R. 383). The allotting on the Quiniaelt Reservation was discontinued after the filing of the schedule of 1910, as the Interior Department had decided that timber land was not allotable, and was not resumed for fifteen years thereafter, not until after the decision of this Court in the case of *Tommy Payne v. The United States*, in 1924, 284 Fed. 827, 264 U. S. 446. Allotment work was resumed in 1925 and this litigation ensued. Residence upon the Quiniaelt Reservation or any reser-

vation was not essential for allotment. See Executive Order of 1873, Act of March 4, 1911, and Allotment Instructions in Appendix "C" "F" and "H"; also testimony of Superintendent Johnson (R. 499). The Quiniaelt Reservation is a heavily timbered area. Residence thereon is not possible until the land is cleared and fit for cultivation. (R. 383, 404, 426, 500). As testified by Allotting Agent Roblin, the Act of 1887 did not require residence in order for an Indian to secure an allotment on a reservation (R. 443) (Excerpt from Act of 1887 in Appendix "D").

The Quiniaelt Indian Reservation, as originally surveyed and set apart, consisted of only 10,000 acres (R. 469). At the time of the treaty in 1855 and 1856 (see Treaty in Appendix "A"), the Quiniaelt Indians numbered only 158 (R. 386). The reservation was enlarged by the Executive Order of November 4, 1873 (see Appendix "C"), to nearly 224,000 acres. (Bureau of American Ethnology, Handbook of American Indians, Part 2, p. 388, Executive Order of November 4, 1873, in Appendix "C") (R. 436, 442 and 443). This Executive Order was promulgated under the terms of the treaty with the Quiniaelts and other Indians giving the President of the United States the right to combine the Indians in the treaty with other friendly bands and tribes of Indians, (see Article 6 of

Treaty in Appendix "A"), and "to provide for other Indians in that locality" and "other tribes of fish-eating Indians on the Pacific Coast." (See Executive Order of November 4, 1873, in Appendix "C").

It appears from the letter of the Superintedent of Indian Affairs for Washington Territory, in which he recommended this enlargement, that he thought the enlarged area contained more agricultural and grazing land than it actually did contain. (Exhibit No. 9). Because of the uninhabitable condition, no effort has been made to place upon the reservation the Indian bands and tribes for which it was enlarged and set aside. A few of the Indians already allotted who have resided on and near the borders of the reservation have held fishing locations on the Quinaielt River (R. 398, 476). The fish have been sold commercially. However, the Quinaielt River is not a large river as is the Columbia and this fishing industry on the Quinaielt, while limited, is able to provide a living for about 25 or 35 Indian families. The reservation was set aside to provide for about 2,200 Indians, giving each of them 80 acres (R. 442, 443).

Without indulging in argument, we will say that we could never understand why these few Indians who were able to make a living on the reservation should be more favored than the far greater

number who have been forced to make a living off the reservation. Possibly the Indian Department has heretofore held this view also (R. 499). The Act of March 4, 1911, fully protected the rights of these Indians living on the reservation by providing that allotments to the other Indians should be made "after allotments to the Indians thereon have been completed."

The Indian Department has looked forward to the day when the timber should be sold and logged off by large scale logging operations (Appendix "I"). This is the present situation and the reservation is being rapidly cleared of the timber.

If it were not for the allotment acts and the policy of the government encouraging the Indians to take on the habits and customs of civilized life, it would seem that as soon as the timber has been removed the next step would be to place on the reservation the Indians for whom the reservation was set aside. But with the allotment acts in force it is clear that the Indians should not be placed on the reservation as tribes or bands but that the individual members of these tribes or bands or remnants thereof should be given allotments. The purpose of this litigation is to determine what Indians should be allotted on the Quiniaelt Reservation.

All the petitioners come within the saving clause of the Act of June 7, 1897, (see Appendix

"E"), or are the children of Indian fathers, or are the children of Indian fathers and Indian mothers.

Tribes Whose Families Have Been Allotted By Respondent

The Indians who have heretofore been allotted lands in severalty on the Quinaielt Reservation without the necessity of their being adopted into the Quiniaelt tribe and without requiring residence on any reservation, are individual members of the following tribes and bands in that locality (Quinaielt Reservation) consisting of Quinaielt, Quileutes, Queets, Hohs, Upper Chehalis, Lower Chehalis, Chinooks, Cowlitz and mixed bloods of the above named tribes and bands, all fish-eating Indians of the Pacific Coast of Washington (R. 411, 412, 421, 426, 443, 445, 447, 448, 466, 476, 481, 493, 494, 495, 496, 498, 499, 500, 502, 503, 506, 526, 531, 534, 535, 551, 552, 553, 569).

It is agreed and stipulated that Lower Chehalis Indians are entitled to allotment on the Quinaielt Indian Reservation (R. 421).

It is stipulated by the parties in all the cases that the petitioners in each instance have made selections for allotment and that the allotments have been objected to by the Department (R. 528).

Names, Residence and Family Relationship of Petitioners

The first six petitioners in the first four cases, known as the Halbert children, are admitted to be the children of duly enrolled and allotted Indian fathers of the Quinaielt Reservation (R. 9, 27, 45, 63). The names of the first four petitioners were on the Quinaielt roll for several years and dropped without notice so far as the record discloses (R. 395, 396). Those petitioners live at Hoquiam, Washington, where the Quinaielt Agency is located and where their fathers and grandmother, Quinaielt allottees, have always resided, with the exception of the petitioner Rich Halbert, who lives within 200 feet of the boundary of the Quinaielt Reservation (R. 398).

The petitioners, Lulu M. Elliott, Sophie M. Elliott, Carolyn M. Elliott, Marion E. Elliott, Emma S. Elliott and Norma C. Elliott, are children of an Indian father and an Indian mother, both of whom are enrolled, recognized and allotted Quinaielt Indians (R. 131, 136), were born and reared at Dahlia, Wahkiakum County, Washington, their father is a fisherman, and the respondent has recognized, enrolled and allotted on the Quinaielt Reservation the father, mother, grandmother, fifteen uncles and aunts, and numerous cousins (R. 130, 137, 485, Plaintiff's Exhibit No. 10, 490). What

has been said about the last group applies to the appellees in cases 149 and 150, except that in these cases the petitioners are children of an Indian father and a white mother, the father being allotted on the Quinaielt Reservation. (R. 227, 234, 248, 255).

The petitioners, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, are the children of Louise E. Henry, who was enrolled and allotted on the Quinaielt Indian Reservation. They live where they have always lived (R. 267, 273, 342, 490-491). This last group are children of a marriage between their Indian mother, Louise E. Henry, and a white man, *contracted in 1890* (R. 491).

The petitioners, Mary Barichio Petit, Norris A. Petit, Ellis A. Petit, are all offspring of an Indian father and Indian mother. Mary Barichio Petit is the daughter of Frank Barichio, an enrolled and allotted Quinaielt Indian, and Leda Givens, a woman of part Indian blood. Norris A. and Ellis Petit are children of this Indian woman and Paul Petit, a recognized and allotted Quinaielt. Petitioner Oscar Brignone is a grandson of Ellen Amelia Springer, Quinaielt allottee No. 595. The petitioner Dewey Barichio is a brother of Mary Barichio and the son of Frank Barichio, Quinaielt allottee. The wife of petitioner Dewey Barichio, and the

mother of petitioners, Romie D., Leda E. and Andrew B. Barichio, is Vinie Wilson, duly enrolled and allotted on the Quinaielt Indian Reservation. (R. 550 to 553, 569-573).

The Barichio and Petit families have lived on Shoalwater Bay, Washington, with the colony of Quinaielt Indians there residing, virtually all the members of which were allotted on the Quinaielt Indian Reservation prior to 1908 (R. 493-495, 498). This family is of mixed Quinaielt and Lower Chehalis blood, (R. 550-553), and under the stipulation (R. 421), its members should be allotted.

The petitioners, Rose Peers Pickernoll, Mabel Peers White and Amelia Peers Alden, are the children of an Indian father, Henry Peers, a Lower Chehalis Indian (R. 519), and an Indian mother, Judith Ducheney (R. 93, 98, 99), a Quinaielt Indian, a sister of Agnes Elliott, allotted on the Quinaielt Indian Reservation. Petitioner Rose Peers Pickernoll is the wife of an allotted Quinaielt Indian (R. 520). They live at or near Dahlia, Washington, strictly an Indian village, the original tribal habitat of their people (R. 520), and under the stipulation (R. 421), they are entitled to allotments.

The petitioners, Virginia, Alvin and Catherine Walkowsky, minors, are children of an Indian woman, Kate Walkowsky Weiss, a Quinaielt Indain, and a white man, John Walkowsky, whom she

married January 9, 1893. The petitoners are full brothers and sisters of Albert Walkowsky, Louise Walkowsky, Frank Walkowsky, Ida Walkowsky, Grace Walkowsky Griggs, Leonard Walkowsky, Rose Walkowsky and Kenneth Walkowsky, all of whom are duly enrolled and allotted upon the Quinaielt Indian Reservation (R. 521, 522). Petitioners live with their mother, Kate Walkowsky, at Oysterville on Shoalwater Bay, Washington, among that branch of the Quinaielt tribe heretofore referred to. Oysterville is a little settlement where the Indians make a living gathering oysters (R. 498, 521, 542). These petitioners are the offspring of a full blood mother, either Quinaielt or a Lower Chehalis by blood (R. 521, 542, 543, 546), and under the stipulation at page 421 of the record, are entitled to be allotted.

The petitioners Eugene Smith and Alvin Smith, are children of Lizzie Rolfson, allotted on the Quinaielt Reservation by the District Court and the Circuit Court of Appeals (R. 683), the latter court affirming the District Court by finding her to be a Lower Chehalis Indian. The Circuit Court of Appeals follows the stipulation of the lower court agreeing that Lower Chehalis Indians are entitled to allotment (R. 421). Eugene and Alvin Smith were born of a marriage of an Indian woman, Lizzie Rolfson, and a white man, said *marriage*

having been *solemnized* in the year *1887*. The petitioners were born, reared and lived most of their lives at Hoquiam, Washington, where their mother now lives (R. 391 to 393, 472-476), in the original tribal habitat of their ancestors.

The petitioners, Mary Francis Provoe, Laura M. Brown, John W. Provoe, Frank M. Provoe, Rosa H. Garrard, Sarah Spencer, Isabelle R. Rainey, William A. Provoe and Raymond A. Provoe, are members of the Chehalis tribe of Indians of which the Quinaielt is a branch, and are all fish-eating Indians of the Pacific Coast, residing in Southwestern Washington in the vicinity of the Quinaielt Reservation. Several of them live on the little Chehalis Reservation, near Oakville (R. 586-590, 596-600). It should be noted that the expression "fish-eating Indians" is used in the Executive Order of November 4, 1873 (Appendix "C" hereto), and is defined on page 298 in the Solicitor's opinion (R. 295-326). Mary Francis Provoe was married to an Indian, David Provoe, in 1870, who was the father of the above named petitioners (R. 587, 588). Petitioners were recognized as belonging to the Quinaielt tribe in 1912 by an unanimous vote of the Quinaielt council (R. 586, 587).

The petitioners, while not living within the area ceded in the Quinaielt and Quileute treaty, do live

within the area contemplated in the prior negotiation of February 25, 1855. Two of the petitioners, Rich Halbert and Sarah Spencer, live within the area ceded by the Quinaielt treaty (R. 398, 597).

Findings of District Court Not Questioned by Circuit Court of Appeals

The decisions of the Circuit Court of Appeals in these cases do not question the findings of the trial court as set forth in the memorandum decision of District Judge Cushman (R. 285) as to the family relationship, residence or the tribal relationship of the petitioners, nor do they, nor does the record, question the enrollment, recognition and allotment of numerous members of the families of peitioners, nor do they question the findings of the District Judge as to the date of the several marriages of petitioners' parents. The decisions of the Circuit Court of Appeals are based solely upon the questions of non-residence on an Indian reservation, the application of the Act of 1897 and the Act of March 4, 1911, to the cases, and the lack of tribal affiliation, and seem to carry the idea that the record does not show that petitioners exhausted their efforts with the Secretary of the Interior before suing for their allotments (R. 669). The evidence in these cases and the express stipulation of the parties show that the petitioners did everything on their part to secure their rights before resorting to the Courts.

Stipulation of Counsel (R. 528). Surely nothing unreasonable should be expected of these Indians in this respect, and the fact that respondent is opposing these allotments, on grounds denying their legal right to allotment, shows that no such technical contention has merit.

The decision of the Circuit Court of Appeals does not pass upon the fact that these petitioners have never had an opportunity to live on any reservation, but in fact have been denied that right, and that every complaint contains the following allegation:

> "That notwithstanding all of the facts hereinbefore alleged, the defendant, its officers and agents, have unlawfully failed, neglected and refused to allot the said land to the plaintiffs herein. . . . and have denied and excluded, and still deny and exclude plaintiffs herein from said land, and have refused and still refuse to let the said plaintiffs go upon or reside upon said lands or any portion thereof; that said plaintiffs are entitled to have said lands so selected allotted to them and desire that the same be allotted to them and that their rights be recognized and that they may be permitted to go upon, live upon, cultivate and improve said lands as their homes,"

showing a willingness on the part of the petitioners

to go on the reservation and make their homes thereon (R. 6, 10, 24, 25, 28, 42, 43, 46, 60, 61, 64, 96, 99, 114, 118, 133, 134, 137, 154, 155, 158, 173, 174, 177, 178, 194, 195, 198, 213, 214, 217, 231, 232, 236, 252, 253, 256, 270, 271, 274-275). The allegations just quoted so far as concern the facts stated, are in substance admitted by the answers. (R. 10, 28, etc.).

Nor does the Circuit Court of Appeals pass upon the fact that the Department has at all times told the Indians of Southwestern Washington that they could continue to live off the reservation and would thereby in no way jeopardize their rights on the reservation given them by the Executive Order of November 4, 1873, and the Act of March 4, 1911, (R. 494, 499). (Appendix "C" and "F"). Furthermore, that the Court does not pass upon the effect of the inordinant delay of the government in allotting the Quinaielt Reservation. The General Allotment Act was passed in 1887. Nor does the Circuit Court of Appeals attempt to construe the Executive Order of November 4, 1873 (Kappler's Ind. Affairs, Vol. 1, 2nd Ed. pp. 923-924), (Appendix "C"), or pass upon its effect. (R. 668).

IV.

SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals erred in holding that petitioners are not entitled to allotment, although it appears that petitioners are either Quinaielt Indians or other fish-eating Indians of the Pacific Coast contemplated by the Executive Order of November 4, 1873, and notwithstanding the fact that the Quinaielt Reservation was enlarged from 10,000 acres to 224,000 acres, especially to provide for them, and although petitioners, at the time of applying for allotment, lived in the original tribal habitat of their ancestors, where many members of their families have been allotted, and although petitioners have been denied by respondent the right to go upon or reside upon the reservation.

2. The Circuit Court of Appeals erred in applying to petitioners the rule of necessity of prior residence as a condition to allotment on the Quinaielt Reservation, which is a heavily timbered area and unfit and unsuited for a home until the land is cleared.

3. The Circuit Court of Appeals erred in holding petitions to be without the right of allotment because of non-residence on the Quinaielt Indian Reservation, such reservation being specifically covered by an executive order which provides for

other Indians in that locality, and there being a specific act of Congress expressly providing for allotments from surplus land *after allotments to Indians on such reservation have been completed.*

4. The Circuit Court of Appeals erred in refusing to hold that petitioners who are children of an Indian woman and a white man whose marriage occurred prior to the passage of the Act of June 7, 1897, are entitled to allotment, the fact being that petitioners and their mother were and are now living in their original tribal habitat and in the same place where such Indian mother was recognized, enrolled and allotted as a Quinaielt Indian.

5. The Circuit Court of Appeals erred in applying the Act of June 7, 1897, to such of petitioners as are children of an Indian father who was duly recognized, enrolled and allotted as a Quinaielt Indian, and in refusing to hold that said Act of June 7, 1897, only applies to the children of an Indian woman and a white man.

6. The Circuit Court of Appeals erred in applying the Act of June 7, 1897, to such petitioners as are children of an Indian father and an Indian mother, where either the father or mother or both were duly recognized, enrolled and allotted Indians of the Quinaielt Indian Reservation, and in refusing to hold that said Act of June 7, 1897, applies

only to the children of an Indian woman and a white man.

7. The Circuit Court of Appeals erred in refusing to consider material the facts that the delay in allotting the reservation was caused by the unlawful acts of the respondent and its officers and representatives, through no fault of the petitioners, and that, by reason of such delay, petitioners were forced to live and work away from the reservation at some gainful employment.

8. The Circuit Court of Appeals erred in holding that said petitioners are without the right of allotment on the Quinaielt Indian Reservation for the reason that petitioners have in a measure adopted the habits and customs of civilized life by living in mixed white and Indian communities off the reservation, the sites of which communities are the original habitat of the tribe or band to which their progenitors belonged.

9. The Circuit Court of Appeals erred in denying petitioners rights to allotments of land on the Quinaielt Reservation on the ground that only the descendants of the tribes and bands of Indians who signed the treaty of 1855 and 1856 are entitled to allotment on this reservation, notwithstanding that the special act of Congress, the Act of March 4, 1911, (See Appendix "F"), expressly provides for allotment to "*other tribes of Indians in Wash-*

ington" who are affiliated with the Quinaielt and Quillehute Indians in this treaty after allotments to Indians on the reservation have been completed.

10. The Circuit Court of Appeals erred in holding that certain of petitioners who are citizens of the United States are by reason thereof not entitled to allotments of land on the Quinaielt Indian Reservation (R. 651).

11. The Circuit Court of Appeals erred in holding that children of duly recognized, enrolled and allotted Quinaielt Indians must be adopted into the Quinaielt tribe before being entitled to allotments of land on the Quinaielt Indian Reservation (R. 652).

Cases Herein to Which Each Specification of Error Applies

(a) Of the above Specifications of Error, Numbers 1, 2, 3, 7, 8, 9 and 10 are made for and are applicable to the cases of all the petitioners in all the cases herein consolidated for trial and appeal.

(b) Specification of Error Number 4 is made in behalf of, and is applicable to, the case of the petitioners in the actions wherein Virgina Walkowsky, et al, are petitioners; to the case wherein Agnes Rubens, et el., are petioners; and to the case wherein Alvin Smith, et al., are petitioners.

(c) Specification of Error Number 5 is made in behalf of and is applicable to the case of the petitioners in the actions wherein Hilary Halbert, Jr., et al., are petitioners; to the case wherein Rich Halbert is petitioner; to the case wherein Vernon Sidney Halbert is petitioner; to the case wherein Sidney Seth Halbert is petitioner; to the case wherein Edna May Elliott, et al., are petitioners; and to the case wherein Charles G. Eliott, Jr., et al., are petitioners.

(d) Specification of Error Number 6 is made in behalf of and is applicable to the case wherein Lulu M. Elliott, et al., are petitioners; to the case wherein Mary Barichio Petit, et al., are petitioners; to the case wherein Dewey Barichio, et al., are petitioners, and to the case wherein Rose Peers Pickernoll, et al., are the petitioners.

(e) Specification of Error Number 11 is applicable to all the cases which were combined for the purpose of trial and appeal, excepting the case in which Mary Francis Provoe, et al are petitioners, and in the case in which Rose Peers Pickernoll, et al., are petitioners.

V.

ARGUMENT

INTRODUCTION

Petitioners claim that they are entitled to an allotment of 80 acres of land each upon the Quinaielt Indian Reservation under and by virtue of:

1. The Quinaielt Treaty of July 1, 1855, and January 25, 1856. (Kappler's Ind. Affairs, Vol. II, p. 719).

2. The Executive Order of November 4, 1873. (Kappler's Ind. Affairs, Vol. 1, pp. 923-924).

3. The Act of June 7, 1897. (30 Stat. L. 60-90, 25 U. S. C. A., 184).

4. The Allotment of March 4, 1911, (36 Stat. L. 1345).

5 The opinion of the Solicitor for the Interior Department dated September 2, 1916. (Exhibit No. 9). (R. 295-326).

6. The allotment instructions of the Interior Department, Section 324 of 1904, with amendments thereto. (Appendix "H").

The trial court so held, and in his memorand-

um opinion clearly outlines the reasons therefor. (R. 285-375).

The Circuit Court of Appeals reversing the trial court held petitioners were not entitled to allotment for the reasons:

1. That petitioners did not live upon the Quinaielt Reservation, nor did they live upon any Indian Reservation.

2. That they were citizens of the United States and consequently not entitled to allotments of land on an Indian reservation.

3. That being citizens of the United States, though Indians, they must be adopted into the Quinaielt tribe.

4. Respondent contends that the Act of March 4, 1911, (Appendix "F"), supersedes the Executive Order of November 4, 1873 (Appendix "C"), and permits allotment to members of only the tribes specifically named in the Act, and excludes members of the other tribes or bands provided for in the Executive Order. The Circuit Court of Appeals does not definitely pass on this contention.

General Argument

These are difficult cases to present clearly to

an appellate court. . 16 cases, comprising originally 63 applications for allotments on the Quinaielt Indian Reservation of Washington were combined for purpose of trial and later for appeal. It was necessary to take a very large amount of testimony relative to the ancestry and affiliation of the Indian applicants, the early history of the country, and the policy and procedure of the Interior Department. The testimony was frequently conflicting, though in the main it can be reconciled. Before a judge, a pioneer in the State of Washington, who had tried many similar cases, who had a thorough knowledge of the Indians of Washington and of their history, and before whom many of the witnesses had appeared in other trials, the presentation was not so difficult. Nevertheless, the trial judge demanded a complete transcript of the record and took the cases under advisement for 6 months before he rendered his opinion, allotting petitions and denying allotments to 7 of the applicants.

So voluminous and in some places so contradictory is the record that its interpretation is subject to the same danger as is the piecemeal interpretation of the Bible. The appellant's (now respondent) brief before the Circuit Court of Appeals consisted very largely of excerpts taken here and there from the testimony and it was argued that, because the opinion of the trial court was not always in ac-

cord with these excerpts, the trial court erred in granting these allotments, a conclusion certainly not borne out by the record in its entirety. Particularly de we believe that an erroneous impression was given with regard to the amount of Indian blood of some of the petitioners. This we will speak of later.

At the very outset we wish to correct a very serious misconception, one which we feel must have influenced the Circuit Court of Appeals in reversing these cases. The misconception is in regard to the equities of petitioners. Respondent, after its own summary of the evidence, concluded its Circuit Court of Appeals brief as follows:

> "These are equity cases, and the whole fabric thereof, as fashioned below, is here in its constituent threads for analysis and review."

"The whole fabric of those cases," as therein summarized, consisted of parts of the testimony carefully selected so that an altogether incorrect picture of the equities was given.

We are reluctant to criticise a court of such high standing as the Circuit Court of Appeals for the Ninth Circuit. Nevertheless, we are convinced that these cases were given but a cursory examination and hasty treatment by that Court. Whether or not that treatment was the result of miscon-

ception as to the equities, we do not know. As evidence of the hasty treatment, we cite the case of the children of Kate Walkowsky (No. 152) wherein the Court finds in its opinion that Mrs. Walkowsky was an Indian whose mother was of the Wynooche band of the Lower Chehalis and her father was a full blood Chinook, and then proceeds to decide the question of the rights of the children to allotments on the ground that she, Mrs. Walkowsky, was a half-blood! (R. 648). In fact, it is admitted on page 522 of the record that Mrs. Walkowsky's mother and father were both full blood Indians! This glaring error was not corrected even after it was called to the Court's attention in our petition for a rehearing. After finding in the opinion that her mother was of the Wynooche band of the Lower Chehalis, the Court proceeds to deny her children on the ground that her mother's tribe was the Chinook. And these half-blood children were born after Mrs. Walkowsky's adoption into the Quinaielt tribe! Even this adoption was not necessary for her allotment (R. 448). The Circuit Court of Appeals says she is not a Quinaielt by blood but only by adoption. Her mother was a Lower Chehalis, which tribe was enrolled with the Quinaielts and by stipulation entitled to allotment (R. 421). She herself is a full blood Indian and the Chinooks, the tribe of her full blood Indian father, are fish-eating Indians of

the Pacific Coast, living between the mouth of the Columbia River and Shoalwater Bay, and are entitled to allotment under the opinion of the Solicitor for the Interior Department (R. 295-326).

In the Rolfson case, after the trial court found that Lizzie Rolfson lived and was associated with the Indians, and was herself a recognized member of the Lower Chehalis band or tribe (R. 362), the Circuit Court of Appeals denied allotments to her children born of a marriage contracted in 1887, a ruling directly contrary to the decision in the case of *Oakes et al. v. United States*, 172 Fed. 305.

Again in the Walkowsky case (R. 649) the Circuit Court of Appeals quotes as authority that part of the case of *Pape vs. United States*, 19 Fed. (2nd) 219-220:

> "We find no authority to sustain the construction that, when an Indian woman married a white man after the act of 1897," etc.

The petitioners in this case were born of a marriage contracted on January 9, 1893! (R. 521).

In the decision in the Provoe case herein (R. 666) (Case 154), the Circuit Court of Appeals says:

> "We conclude that the Chehalis Indians, both Upper and Lower, and the Cowlitz were not af-

filiated with the Quinaielt and Quileute tribes within the meaning of the Act of Congress of March 4, 1911, supra." 38 Fed. (2nd) 804, (R. 666).

Yet immediately thereafter the Court states: "nor do we wish to be understood as determining whether or not Upper Chehalis Indians are provided for by the proclamation." (Executive Order of November 4, 1873 (Appendix "C") which enlarged the Quinaielt Reservation to 22 times its original size for the "Quinaielt and Quileute Indians" and "other Indians in that locality" and for "other tribes of fish-eating Indians on the Pacific Coast.") (Part in parenthesis ours).

In other words, the Quinaielt Reservation may have been enlarged and set aside for the fish-eating Indians on the Pacific Coast, but these Provoes, though they belong to those tribes, though they are Indians on both sides of the family, and though most of them live on the little one-section Chehalis Reservation at Oakville, are not entitled to allotment on the Quinaielt Reservation which the court in effect says may have been set aside for them.

The Court denies the great portion of the petitioners solely on the ground of non-residence on an Indian reservation, in spite of the fact that of the 1400 or more Indians already allotted 1000

have never resided on an Indian reservation (R. 466, 383), nor have their ancestors, and in spite of the fact that their fathers or mothers or both fathers and mothers are enrolled and allotted on the Quinaielt Reservation. With peculiar inconsistency the Circuit Court of Appeals then proceeds to allot Lizzie Rolfson and Archie Pellard, non-reservation Indians whose parents and ancestors, so far as the record shows, never resided on an Indian reservation. This is more than counsel are able to understand.

There are many other errors and inconsistencies, the greatest being the complete disregard of the peculiar local situation and allotment history.

But as to the equities, we can say, without resorting to unjustified sentiment, that the Indians of Southwestern Washington have been more miserably treated than any group of Indians in the United States. A vast and valuable territory extending from the Olympic Mountains to the Columbia River on the coast of Washington was taken from them and they were in no way compensated for it. They once owned the oyster beds in Grays Harbor and Shoalwater Bay but the whites own them now. They once fished the bays and rivers at will but their rights to so fish, which the Indians believed were protected for all Indians by the many treaties with the other tribes of Washington, were construed to

mean only during the fishing seasons determined by the State Game Commissioner. *State v. Towessnute*, 89 Wash. 478, *State v. Meninock*, 115 Wash. 528.

It is true that the Cowlitz, Chinook, Shoalwater (Chehalis) and Chehalis Indians refused to sign the treaty at Cosmopolis because the tribes to the north were their enemies and they thought if they went up on a reservation in the Quinaielt country they would all be killed. But James G. Swan, whose fascinating description of the Cosmopolis negotiations is the one original authority on the subject, throws more light on these negotiations. He quotes the speech of Narkarty, one of the Chinook chiefs:

> "We are proud that our great father in Washington thinks of us. We are poor, and can see how much better off the white men are than we are. We are willing to sell our land, but we do not want to go away from our homes.
>
> "Our fathers, and mothers, and ancestors are buried there, and by them we wish to bury our dead and be buried ourselves. We wish, therefore, each to have a place on our land where we can live, and you may have the rest; but we can't go north among the other tribes. We are not friends, and if we went together we should fight, and soon we would all be killed."

And then Judge Swan continues:

"The governor certainly erred in judgment in attempting to place five different tribes on the same reservation; but his motive was, that they were so few, being mere remnants of once powerful bands, it would be better to have them concentrated at one point. They, however, did not think so; their ancient prejudices were as strong as ever, and they knew they could never agree to live together. They were willing to concentrate at a given point on their own lands, and it is a pity that the governor did not see the benefit that would arise by their so doing. A hundred Indians, all that remained of the Chinook tribe, if located at one point, would be in nobody's way, and certainly there is plenty of room in their possessions. So of each of the other tribes."—(Three Years at Shoalwater Bay, By James G. Swan, p. 338).

Was the refusal to sign the treaty so unreasonable that these tribes should lose all their rights forever?

In the years that followed the treaty the white men moved in and rapidly took the lands which once belonged to these Indians, under the authority of Congress. (Oregon Donation Land Act, September 27, 1850. [9 Stat. L. 496]). But the coming of the

whites did bring its advantages. With the more stable government it soon became safe to place these once somewhat hostile tribes on the Quinaielt Reservation and to thus fulfill Governor Stevens's original desire. So after the Act of March 3, 1871, (16 Stat. 566, R. S. 2079), (Appendix "B") forbade the making of further treaties with Indian tribes, the Executive Order of November 4, 1873, (Appendix "C") was promulgated enlarging the Quinaielt Reservation to 224,000 acres, for the use of the other fish-eating Indians on the Pacific Coast in addition to the tribes therein mentioned, thus remedying the above injustice. In spite of the Solicitor's opinion of September 2, 1916, (R. 295-326) respondent and the Circuit Court of Appeals would have us believe that the Quinaielt Reservation was enlarged from 10,000 acres to 224,000 acres to provide for 44 Ozette Indians, as outlined in its opinions (R. 638, 639, 640).

Fifty-seven years have elapsed and these tribes have not been placed upon the Quinaielt Reservation. Forty-three years have elapsed since the passage of the General Allotment Act of February 8, 1887, and the reservation is scarcely more than half allotted. There has been delay after delay. After allotment work was started in 1905 (R. 437) it was stopped in 1910 (R. 428, 437, 539) because the Department ruled that timber land was not

allotable. It was not resumed until 1925, after the case of *Tommy Payne v. United States*, 284 Fed. 827, 264 U. S. 446, was decided, after which this litigation was begun. All other reservations in Western Washington had been allotted many many years before (1890 to 1912). If the Court will but refer to the reports of the Superintendent for the Quinaielt Agency for the years 1891 to 1900, it will be seen how the Indians were literally begging to be given allotments thirty or forty years ago. And in all these years the whites have moved in and around these Indians, and the tribal organizations of these fish-eating Indians have slowly and gradually broken down. Those of the Quinaielts have been kept up only by the local field officials. (R. 409, 410, 538). And yet respondent would seek to deny petitioners allotments because of lack of tribal organization. When we show that the families of many petitioners have been and are on the census rolls as belonging to the Quinaielt or other fish-eating tribes (Upper Chehalis, Shoalwater Bay, etc.) respondent discredits its own census rolls (R. 411, 433, 538, 594) and then seeks to deny others because their names do not appear on the census rolls (R. 411, 591-592). When we show that the allotment roll is the only accurate roll and show that the fathers or mothers or both fathers and mothers of petitioners, and relatives are allotted, respondent repudiates its own allotment instuctions (R.

525) and says that, because the parents are allotted, it is no reason why the children should be. (R. 452). But Exhibit 15 shows beyond doubt that the allotment instructions of 1904 are still in effect. This exhibit is also copied into the record (R. 616) but with one reporter's mistake. The word "enrollment" should read "adoption". See Exhibit 15. The rights of the children are clearly shown by the opinion of the Attorney General in reference to the children of Frank Mounts (1929) Appendix "J".)

The Court will observe the reasonable and fair way this question of tribal organization was treated by the trial court:

> "The evidence in the present case indicates that the Indians at Chinook, Dahlia, Shoalwater Bay and Oakville have no tribal organization. They are, as the witness Bush says of the Indians at Shoalwater Bay, 'remnants of bands and tribes.' The Superintendent of Indian Affairs for Washington Territory, in recommending the enlarged reservation, said (1872):
>
> > 'all of the tribes made parties to this treaty, together with the remnants of the Chehalis, Humptulips, Shoalwater Bay and Chinook tribes,. . . . .'
>
> "They still cling together at and about the old haunts of the former tribal organization and are

therefore 'tribes' within the meaning of the Executive Order and Act of March 4, 1911. In the Montoya case, supra, the tribal characteristic of one leadership of government and the band characteristic of one leadership in a common design or concerted action is pointed out by the court. This characteristic in so far as the groups of Indians above-named in the present case, is, save as pointed out, wanting, as there is no tribal organization. But it should be borne in mind in considering the language of the court above quoted from the Montoya case, that the court was considering the question of tribal action or the action of a band as distinguished from the individual action of members of a tribe or band. To such action leadership would be essential. The court was not considering the question of surviving membership in a vanishing tribe" (R. 331, 332).

But respondent, while not openly contending, at least appears to suggest that these cases have no equity because of the presence of white blood or because some of the petitioners do not live in the same manner as did their ancestors. We cite then the following acts of Congress:

Act of June 14, 1862 (12 Stat. L. 427, R. S. 2119).

Act of March 3, 1875, (18 Stat. L. 420).

Allotment Act of February 8, 1887, (24 Stat. L. 388). (Appendix "D").

Act of August 9, 1888, (25 Stat. L. 392).

Act of June 7, 1897, (30 Stat. L. 90) (Appendix "E").

Act of May 8, 1906, (34 Stat. L. 182).

And finally the Citizenship Act of June 2, 1924, (See Appendix "G").

All of these acts of Congress, and many others of like tenor, show a studied policy, a direct intent on the part of Congress that these people should not be penalized for giving up the customs and habits of their forefathers and living as civilized men. All these acts are particularly applicable to the situation of the petitioners who could not go upon the reservation owing to conditions described herein.

Even the presence of white blood should not affect the equity of these cases. These suits are brought under a statute which reads:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment . . . . . "

(25 U. S. C. A. 345) (28 Stat. L. 305 Sec. 1).

It is admitted by the United States that the quantum of Indian blood is not the test of a right to allotment (R. 451). Many Indians have much less of Indian blood than petitioners have been allotted (R. 451).

The action of the Circuit Court of Appeals in the present cases strongly suggests that it believed that only children of full blood Indians should be allotted. Anyone acquainted with Indian law knows that the United States Government has never taken that attitude. Mixed bloods have always been provided for.

The recent Act of June 4, 1924, (C. 253, 43 Stat. L. 376, U. S. C. A. Title 25, pages 186-188), relating to the lands of the eastern band of Cherokee Indians and in part to the allotment of said lands shows this. Section 13, page 188, provides:

> "That any member of said band whose degree of Indian blood is less than one-sixteenth may, in the discretion of the Secretary of the Interior, be paid a cash equivalent in lieu of an allotment of land."

The very lowest degree of Indian blood of any of the petitioners is one-eighth.

See also *Sioux Mixed Blood Cases;* Opinions of Attorney General, Vol. 20, pp. 742, 743.

Pennock v. Commissioners, 103 U. S. 44.

Besaw v. Work, 6 Fed. 2nd) 694.

Sloan v. United States, 118 Fed. 283.

While, in spite of the above, we know that, in any case of equitable cognizance involving the relative rights of full bloods and mixed bloods, reasonable minds would and should give the full bloods the greater consideration, this is not a question of relative rights. If the Quinaielt Reservation were a small and limited reservation whereon there was not sufficient room for all, equity would dictate that those whose Indian blood was greatest should be given preference. In such a case respondent's argument might have merit. But the Quinaielt Reservation is a large reservation (R. 442). Almost all of it is allotable land (R. 442). At the date of the trial but a little more than half of it was allotted (R. 443). In that record citation Agent Roblin is wrong on the size of the reservation being some 25,000 acres short, an immaterial amount on such a large reservation. There will be much land left over after all the Indians have been allotted, or at least the work of allotting will continue a great many more years (R. 443). Under the Circuit Court of Appeals ruling on residence, it would continue indefinitely down to the tenth or twelfth generation. Surely no other

group of Indians within the United States have been favored as would be the Quinaielts under that ruling. We know of no Indians more entitled to allotments than these descendants of the fish-eating tribes of Southwestern Washington whose vast territory was taken from them by the white race without any payment or compensation. In any event the rights of the Reservation Indians are fully protected, first, by the treaty which was prior to the Executive Order of November 4, 1873, and, second, by the Act of March 4, 1911, which specifies that allotments as therein provided for should be made from surplus lands after allotments to the Indians on the Reservation have been completed (Appendix "F").

Another way of interpreting this question of the presence of white blood in these Indian petitioners: If the Indians had been placed upon the Quinaielt Reservation at the time of the treaty, 1855-1856, or one year after as therein provided, or at the time of the Executive Order of November 4, 1873, the situation would have been quite different. But in order to make a living they have been forced to stay off the reservation, in their ancient haunts or habitat. The whites in all cases have moved in and around them. There has, of course, been somewhat more interbreeding of the whites and Indians than there would have been had the

Indians been placed upon the reservation. This could scarcely be called the Indians' fault. It is not necessary to go outside of the record. The court will appreciate what kind of marriages are these between white men and these Indian women who lived along the shores and beaches of the Columbia River, Shoalwater Bay and Grays Harbor. The word marriage is often not in every sense applicable. The fact that Lizzie Rolfson, Case 153, has had three white husbands (R. 472), and Kate Walkowsky, Case 152, two husbands (R. 522) is possibly suggestive. The Court knows that the situation of mixed blood Indians in the world is not always pleasant. As Cleve Jackson, hereditary Chief of the Quinaielts, himself says:

> "That outside (the Reservation) any one of any degree of Indian blood is considered by the white man as an Indian, and on the reservation he is considered a white man." (R. 562).

Those of petitioners in whom the degree of Indian blood is less than in some of the others are able to show most clearly recognition and tribal relationship. If it had not been decided and admitted in these cases that degree of blood was not the test (R. 451), we would never have permitted these cases to be combined, for fear of prejudicing the rights of those in whom Indian blood was greater.

We would not here discuss this matter had not the Circuit Court of Appeals apparently considered it a factor in the face of its conceded immateriality (R. 643). We believe that the trial court, having an opportunity to view these people, is in a better position to judge the Indian appearance, mode of life, and the general equities of the situation in this particular.

Is Residence on the Quinaielt Reservation a Prerequisite for Allotment?

The most important question in these cases is whether or not the Chinook, Chehalis (Upper and Lower) and the Cowlitz are entitled to allotment on the Quinaielt Indian Reservation. The lower court, following the opinion of the Solicitor for the Interior Department, held that these Indians should be allotted. The Circuit Court of Appeals, holding that the Act of February 8, 1887, made residence in all cases a requisite to allotment and that the Act of March 4, 1911, did not help matters, decided that they could not be allotted. This latter view is contrary to the views of all of the government's own witnesses, to the long established policy of the Indian Department in this locality, as well as contrary to the opinion of the Solicitor above referred to, which opinion is admitted to be the allotment instructions for the Quinaielt Indian Reservation (R. 295-826).

The ruling of the Circuit Court of Appeals on the question of residence is also contrary to the testimony of Alotting Agent Roblin, who states on page 443 of the record, lines 24 to 30:

> "The Act of 1887 *provided that residence was not necessary;* that he is familiar with the allotment rolls of the Quinaielt Reservation; that there have been some Satsop Indians allotted on the Quinaielt in years gone by, and Humptulips, Bay Center Indians, Lower Chehalis,"

and on page 444 of the record he further testifies:

> "That the Superintendent certified to him the last schedule prepared and forwarded by him to Washington, that that schedule did carry names of members of those various tribes."

H. H. Johnson, who was Superintendent of the Quinaielt Reservation from 1908 until October, 1913 (R. 498) while the first allotments were being made, testifies that residence on the reservation was not a requisite to allotment (R. 497-500-501). This was under the Executive Order of November 4, 1873, (Appendix C), and the Act of February 8, 1887, and before the passage of the Act of March 4, 1911. He testifies that because of the local situation he was particularly instructed to be very liberal in the matter of allotments. (R. 499).

In the face of the opinion of the Solicitor for the Interior Department (R. 295-326) and the documents set out therein, it is not now very strenuously urged by the respondent that the Executive Order of November 4, 1873, was not promulgated to provide for the Indians of Southwestern Washington. They most clearly are the "other fish-eating Indians on the Pacific Coast" referred to in that Executive Order.

Respondent in effect contends, however, that the General Allotment Act of February 8, 1887, (Appendix D), and the Special Quinaielt Allotment Act of March 4, 1911, (Appendix F), have superseded the Executive Order so far as allotment is concerned. This, according to their interpretation of those acts, means that, of the tribes of Indians, or remnants thereof, for whom the reservation was enlarged and set aside, only a few of those tribes are entitled to allotment. The obvious inequity of such a contention urges us to seek for the reasons for its being held. The only reason we can suggest is that the better organized Indians who live upon and close to the reservation have influenced the agents of the government at Hoquiam. The 150 to 200 reservation Indians know that there is more than enough land to allot all the Indians for whom the reservation was set aside (R. 442, 443). Because the other tribes or bands have not been placed upon the reservation, this little group has grown to

believe the reservation belonged to them. They know that timber and land which is left over will belong to all of them as tribal property. It is but natural for them to wish that as few as possible allotments be made on the Reservation. As evidence of this, we have the testimony of Samson Johns, witness for defendant, that he believes only Quinaielt Indians should be permitted on the Quinaielt Reservation (R. 534). Strangely enough this very witness states that he himself is "part Lower Chehalis Indian and part Chinook Indian" and that he, though allotted without adoption, lives at Copalis, not on the reservation (R. 534-535). The record is replete with such testimony.

There is also the testimony of Superintendent Sams concerning the last roll submitted to the council for recognition:

> "That though the Department did approve of a large number of names on this roll that the Indians did not approve of themselves, the reason given for that was that after the Indians had objected to these names, he called a council meeting and endeavored to get the Indians to consider the names objected to at the council meeting, but the Indians declined to do so, saying, 'We don't want these people; we won't vote on them,' and adjourned the meeting; that then he submitted the whole matter to the Indian

Office in Washington, and asked for instructions, and that Department sent back a list of names, 50, 60 or 70 on the list, and told him to certify them because those particular names had been on the roll 10 or 15 years without objections and they had no real grounds to allege they had been put on with fraud, so that on instructions of the Secretary of the Interior he was obliged to certify that list.

"[illegible] there were about 200 names on the last roll that the Indians had not passed upon favorably; that he (the witness) does not know how those names got on the roll, but does know that the Indians object to them being allotted." (R. 468).

When we say the Indian Agents and Allotting Agents may have been influenced by the organized Quinaielt Indians to the prejudice of the others of Southwestern Washington, we do not believe that there has been any deliberate intention toward favoritism on the part of the employes of the government. They have had a difficult task and we merely suggest that they may have been unconsciously influenced by their close contact with the Quinaielt Tribe and by their desire to please the Indians of that tribe.

Referring back to the two allotment acts we said that respondent now contends that these acts

make it impossible to allot the Indians of all the bands for which the reservation was set aside even though 1,000 Indians of these bands have already been allotted.

Let us see if this is true. It is entirely clear from the record that the Indians have never been placed upon the Quinaielt Reservation; that, because of the uninhabitable condition of the reservation, they would have starved to death had they gone there voluntarily (R. 499). It is also clear that many of them have continued to remain in little settlements throughout the region but off the reservation (R. 499). Dahlia on the Columbia River, Bay Center on Shoalwater Bay, and Oakville on the Chehalis River are examples of these settlements, long the habitat of the Indian bands. Some, too, had gone into the white settlements of the neighborhood and worked in mill camps and lumber camps. Mr. H. H. Johnson, former Indian Superintendent for Southwestern Washington, stated that he could never see how this scattering into white settlements to make a living mitigated against their rights on the reservation (R. 500). As we pointed out, both Mr. Johnson and Mr. Roblin, the present allotting agent, say that residence on a reservation is not necessary for allotment on the Quinaielt Reservation under the General Allotment Act of February 8, 1887, (R. 443). It should be noted, however, that, with possibly three exceptions,

the petitioners have not scattered even locally. They all live in the original habitat of their ancestors.

The Circuit Court of Appeals holds that, because that act reads "and cause allotments to be made to any Indian located thereon," residence upon the reservation is a requisite to allotment and, as a result thereof, the Chinook, Upper and Lower Chehalis and Cowlitz Indians who do not live on the Quinaielt Reservation are not entitled to allotment under the General Allotment Act. As authority for such an unjust holding, the Court quotes from the case of *Lemieux v. United States*, 15 Fed. (2nd) 518, wherein it is said:

> "No case has been cited, and we have been unable to find any, which holds that a tribal Indian, living apart from the tribe and off the reservation, is entitled to an allotment under section 1 of the act of 1887, and the language of that act seems to preclude such a holding."

Following this quotation the Circuit Court of Appeals in the instant cases continued:

> "This fact would justify and require the Secretary of the Interior to deny their applications for allotment under the general allotment law and would require a denial of their application by the District Court."

On this question of residence alone the Circuit

Court of Appeals reversed five-sixths of these cases.

This reference to the General Allotment Act in the Lemieux case was clearly dicta, the case being decided on the ground of laches.

The Lemieux case, upon which respondent and the Circuit Court of Appeals rely in holding that residence upon a reservation is necessary to allotment, is worthy of further notice. Peter Lemieux was a Chippewa Indian of the Fon-du-lac band in Minnesota. He made a claim for allotment under the provisions of the Act of 1887 for land upon the LePoint Indian Reservation in Minnesota and received a certificate from the allotting agents showing that he had made a selection. Some of the timber on the selection was sold shortly thereafter and Peter Lemieux received a part of the money. No trust patent was ever issued to him by the government. Shortly after he received this money he and his family left the reservation and began living in Superior, Wisconsin. Seven years later, in 1895, the Department allotted this particular land to another Indian, Shah-bah-yaust, and a trust patent issued to her. Lemieux on November 7, 1923, more than thirty-five years after he had made his selection and twenty-seven years after the land had been patented to another Indian, brought an action to have it determined that he was the owner of this land. This action was in equity in the nature of

an action to quiet title. The court denied him the relief sought, principally and primarily and finally, on the ground of laches. The court goes into a somewhat extended recital of this fact and concludes the opinion with this significant statement:

> "There is nothing about his claim after a a lapse of a period of thirty-five years which appeals to a court of equity."

Furthermore, the Court was therein dealing with a tribe which had actually been placed upon a reservation.

Judge Sanborn in this case of *Lemieux v. United States*, cites the case of *Bonifer v. Smith*, 166 Fed. 846, and the case of *Hy-yu-tse-mil-kin v. United States*, 194 U. S. 401, and distinguishes between those cases and the case he is deciding. Both of these cases deal with the Umatilla Allotment Act of 1885, which dealt with the "confederated bands of Cayuse, Walla Walla, and Umatilla Indians *residing* on the Umatilla Reservation," in both of which cases it was held that, because of the local situation and the long established policy of the government encouraging Indians to break up tribal life and live as white men, residence was not a requisite to allotment under that act. Surely the dicta in the Lemieux case should not be deter-

minative of the rights of petitioners whose situation is so peculiar and different.

It should be noted that petitioners are by no means relying upon the Act of February 8, 1887. The Executive Order of November 4, 1873, was promulgated to provide a reservation for the Quinaielt, Quillehute, Hoh, Quit and other tribes of fish-eating Indians on the Pacific Coast.

This order was promulgated two and a half years after the passage of the Act of March 3, 1871, which prohibited further treaties with Indian tribes. In view of the situation and the historical events which preceded its promulgation (See Statement of Case), it is not an unreasonable contention that this Executive Order was promulgated in lieu of a treaty with the Indians who had met in the negotiations at Cosmopolis but who, as events transpired, did not sign the Treaty of July 1, 1855, and January 25, 1856. It is only by means of such an assumption that the enlargement of the Quinaielt Reservation to 22 times its original size can be explained (R. 499).

In the separate discussion of the Act of February 8, 1887, on page 99, we will show that generally and more especially locally that act has been construed to not require residence upon an Indian Reservation.

It appears to us that the Circuit Court of Ap-

peals did not take into consideration the local situation or the physical condition of the Quinaielt Reservation. It seems that the case of *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, should have been determinative of the question of residence. As we said, the Court was therein interpreting the Umatilla Allotment Act which read:

> "To cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians *residing* on the Umatilla Indian Reservation."

In answering the same argument that is presented in these cases, the Court said:

> "The purpose of the act would fall very far short of accomplishment were allotments to be confined exclusively to those actually residing within the limits of the reservation, while those absent therefrom, but still within the old limits of the land, and were members of the band, recognized as such, should be held not entitled to the allotments under the act, simply because of residence outside of the described limits of the reservation."

How clearly that reasoning would apply to these cases! The petitioners could not go upon the Quinaielt Reservation until it is cleared. They con-

tinued to live in the ancient habitat of their own tribes or bands, and respondent's agents have always told them that their rights on the reservation would not be prejudiced by their so doing (R. 494, 443). Petitioners are all recognized by the Indians of their own settlements and many of them have been recognized by the Quinaielt tribe. The case of *Bonifer v. Smith*, 166 Fed. 846, a corollary to the Hy-yu-tse-mil-kin case, is even more in point.

In this connection, one of the chief reliances of respondent in these cases is the case of *Oakes et al v. United States*, 172 Fed. 305, in which Judge Van Devanter, construing the Act of January 14, 1889, held that the children of an Indian woman who married a white man and left the reservation were entitled to allotments but that the grandchildren were not. It is well to consider the situation in that case as compared with the situation in these cases. The Chippewa Indians ceded a large and valuable country to the United States. They were actually placed upon the White Earth Reservation in Minnesota, a habitable reservation. The lands ceded were sold and the money received therefor paid as annuities to the Indians. (Kappler 2nd Ed. Vol. I). Food, clothing, agricultural implements, cooking utensils were furnished the Indians. Treaties were made with all the bands of the Chippewas, in some cases several, all very favorable to the Indians (Kappler's Laws and Treaties, 2nd Ed.

Vol. II). The Chippewas had waged savage warfare against the United States.

The Quinaielts and Indians of Southwestern Washington had never waged war against the government. The remnant bands of Southwest Washington were not provided for by treaties, the Yakima and Rogue River Wars and the Civil War, followed by the Act of March 3, 1871 (16 Stat. L. 566) (R. S. 2079), prevented further treaties being made. None of them have been given annuities so far as we have been able to determine. The reservation provided was not habitable. They were never placed upon it. They have been by necessity self-supporting Indians.

The Oakes family moved to a great city, St. Paul, and clearly cast their lot with the whites. Petitioners have not cast their lot with the white people, but they still live in their original habitat of their ancestors. This is one vital difference between these cases and the Oakes case. A large number are still fishermen, and make their living in the same manner as did their ancestors.

But respondent would answer to the above: "What you say may be true, the Indians may not have cast their lot completely with the whites, but they have abandoned their tribal organizations. The Acts and Executives Order refer to tribes or members of tribes. Citing *Montoya v. United States*,

180 U. S. 261. This we have already answered but we add that locally tribal organization was a very hazy thing even before the days of the Quinaielt Treaty or the Cosmopolis negotiations. (R. 409, 410, 495, 496, 547, 548). These people are still placed on the government census rolls generally as Quinaielts. (R. 448-493, 593). A similar situation was faced by the Court in dealing with the Klamath Indians who lived on what was claimed to be a totally abandoned Indian Reservation, in the case of *Crichton v. Shelton*, 33 L. D. 205-219. In that case it was said:

> "Being self-supporting and independent as they were, it may be their tribal relations were not so intimate and pronounced as other tribes who were dependent upon the government. But they were nevertheless looked after by agents of the government and were always regarded and treated as a tribe."

The Quinaielt tribe has a business organization to handle a few local matters (R. 432), but aside from that they have no true tribal organization. While most of the Quinaielt Indians do not live upon the reservation, the only tribal meetings are those called by the Superintendent. The Superintendent notifies such Indians as he chooses and calls it a tribal council (R. 467, 607). In the meeting called by Agent Roblin in the year 1918, he called

only 65 out of 750 allotted Indians (R. 437, 480-481, 603). This was a part of the little group of reservation Indians who are able to make a living on the reservation by fishing. These were the very Indians who would be most likely to wish that no more allotments be made. Though the Indians were asked by the Agent Roblin to refuse adoption to many they had in 1912 voted to recognize or adopt (R. 480-481, 607, 608), Agent Roblin did not notify those Indians who were to be voted upon. (R. 607, 608). In fact he states he took pains not to notify them. All of these cases are even stronger than the case of *Besaw v. Work*, 6 Fed. (2nd), 694, wherein the action of a tribal council such as this, even though approved by the Secretary of the Interior, was held to be but a declaration of self interest.

It appears that the lower court viewed the 1918 meeting in a similar way (See page 337 of Record).

If the Agent should call together the Lower Chehalis, or the Upper Chehalis, or the Cowlitz, or the Shoalwater Bay Indians, there would be practically as much reason to speak of these as tribes instead of as remnant bands. But the Agent or Superintendent has not seen fit to call these other groups together, although allotted on this reservation. Annuity payments have doubtless held

many tribes together throughout the country (R. 433). It does not seem that these Indians should be prejudiced because they have not been given annuities, and because therefore the Agent's rolls of them have not always been accurate or correct (R. 411, 433, 538, 594).

THE QUINAIELT TREATY OF JULY 1, 1855, AND JANUARY 25, 1856.

It appears that this treaty was first signed by the Quinaielt Indians on the Quinaielt River on July 1, 1855. Later, and for some reason unknown, the Quileute Indians were brought in for the first time, and the treaty was completed with them at Olympia, Washington, on January 25, 1856, over six months later (12 Stat. L. 971).

As a basis for the argument that follows, we first call attention to Article 6 of the treaty (Appendix "A"), giving the President the right to consolidate the two tribes above named with other friendly tribes or bands. This is the authority by by which the President later promulgated the Executive Order of November 4, 1873, which is discussed at length in this brief.

In order to more fully establish our contention that residence on the Quinaielt Reservation is not a requisite for allotment, we call attention to the fact that this same Article 6 of the Quinaielt Treaty

provides that it should conform to the 6th article of the Treaty with the Omahas, *so far as the same may be applicable.* The itilicized statement should be borne in mind, as the respondent contends that petitioners are bound by Article 6 of the Omaha Treaty, that said Article 6 was the foundation of the Allotment Act of 1887. Respondent alleges that both the 6th article of the Omaha Treaty and the Act of 1887 are inherently settlement acts and that an Indian must first reside upon a reservation before he can apply for an allotment.

The record shows that all petitioners complied with the 6th article of the Treaty with the Omahas embodied in the 6th article of the Quinaielt Treaty, *so far as the same may be applicable.* They could not go upon the reservation as could the Omaha Indians.

In speaking of the Quinaielt Treaty it should be remembered that many of the petitioners claim allotments as Quinaielt Indians and children of recognized and allotted Quinaielt Indians. Into this class come petitioners embodied in cases Nos. 146, 149, 150 and 151. In cases Nos. 147 and 148, the Quinaielt blood and the Lower Chehalis blood is so mixed and intermingled that it is not possible to distinguish between the two (R. 547-548). To some extent this is true in all the cases save in that of No. 154, known as the Provoe case, in which

the petitioners base their right upon a showing not of Quinaielt blood but of Chehalis blood, and upon recognition by the Quinaielt tribe as being Indians entitled to allotment.

Governor Stevens himself, in drafting the treaty, recognized that the Quinaielt Indians lived a nomadic life and would probably continue to so live; that they would continue to fish at their old grounds and stations within and outside of the reservation. This has a very definite bearing on the necessity of residence on the reservation as a requisite for allotment. On this point we cite Article 3 of the Quinaielt and Quileute Treaty (Appendix "A"):

> "Article 3. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands."

In the memorandum opinion in Case No. 272E, *Agnes Elliott et al v. United States*, dated May 21, 1926 (unreported), United States District Court for the Western District of Washington, Southern Division, the case which established the status of

the Elliott family as Quinaielt Indians, the Court said:

> "While the purpose for negotiating the treaty was, in part, to gather the tribes and bands upon the reservation, there is no express provision in the law or treaty for forfeiture of the tribal rights and interests of a member of the tribe who lives separate and apart from the reservation, or separate and apart from the tribe. The language of Sec. 6, of the general allotment Act of 1887, as amended, 24 Stat. at Large, 390; 34 Stat. at Large, 182; Comp. Stat. Sec. 3957, is:
>
> > " 'That every Indian born within the territorial limits of the United States who has voluntarily taken up within such limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is declared to be a citizen of the United States . . . . whether said Indian has been by birth or otherwise a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property.'
>
> "Congress might reasonably conclude that assurance of a retention of interest in tribal property by those who had forever severed the tribal

relation was necessary. Such a provision by no means implies that those who have for even an extended period wandered from the body of the tribe, but still lived the tribal life, are to be cut off. Theirs is still the need for help and encouragement, while with the first class, presumably, the need for aid is passed.'

"'There is no showing that these lands, or the timber on them, have been cared for by those of the tribe on the reservation, which ... would give rise to an estoppel favoring them over those who had strayed from the reservation. In purely tribal life, no doubt the rule would be that those of the tribe who defended the tribal property, in the absence of agreement otherwise, own the property as against those who wandered from it and afforded it no protection. Sec. 6 of the Act of 1887 is inconsistent with any idea upon the part of Congress that because of their turbulence, Indians must any longer be kept upon reservations, for the protection of the whites.'

"In *United States v. Winans*, 198 U. S. 371, the Supreme Court upheld the right of the Yakima Indians to occupy lands off the reservation, on the banks of the Columbia River, for use in connection with their right to take fish from that stream, and dry them. This right was

based upon Art. III of the treaty with the Yakimas which, in so far as material is in substance the same as the treaty with the Quinaielts; which latter reads, in part:

> " 'The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing the same, together with the privilege of hunting, gathering roots and berries and pasturing their horses on all open and unclaimed lands; provided, however, they shall not take shell fish from any beds staked or cultivated by citizens.'

"While the lands ceded by the Quinaielts in the treaty do not include Shoalwater Bay nor extend to the Columbia River, yet the evidence shows that in their fishing and hunting, since and before the treaty, the Quinaielts have been accustomed to go as far up the Columbia River as Chinook and Dahlia. It is not necessary here to adjudicate what if any right, to the exclusion or in common with others, the Quinaielt Indians have or had in such fisheries. It is enough that in resorting to and remaining at the fisheries of Chinook and Dahlia, which fisheries they might in perfect good faith—under the evidence—claim were part of the usual and

accustomed grounds and stations of the tribe, they have shown no intention to abandon any other tribal right or property or sever their tribal relation.

"The conclusion reached is supported by the following decisions: *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401; *Bonifer et al v. Smith*, 166 Fed. 846; *Smith v. Bonifer*, 154 Fed. 889; *Oakes et al v. United States*, 172 Fed. 305; *Sully v. United States*, 195 Fed. 113; *Vezina v. United States*, 245 Fed. 411; *United States ex rel. Besaw v. Work*, 6 Fed. (2) 694; *Bisek v. Bellanger et al*, 5 Fed. (2) 994."

The decision from which the above is quoted established the rights of the parents of petitioners in cases 146, 149, 150 and 151 to allotments as Quinaielt Indians living at or near Dahlia, Washington. The case was never appealed from by the United States. In the present cases respondent seeks to show by the testimony of one or two picked reservation Indians that the members of the Elliott family were not Quinaielt Indians and that no Quinaielt Indians lived down on the Columbia River. The testimony is replete with statements to the contrary (R. 383, 384, 388, 394, 414, 417, 421, 422, 425, 426, 487, 488, 489, 492 to 521, 532, 564, 577). As these cases were tried by District Judge Cushman who tried the above noted case, it was not

thought or considered necessary to introduce detailed testimony which established the status of the parents of the Elliott petitioners to allotments. Pleadings in this case were admitted in evidence (R. 484, 485) (Exhibit No. 10) and many references are made to this case in the Record (R. 485, 512, 606). This part of the argument is applicable, not only to the Elliott family, but also to almost all of the petitioners.

THE EXECUTIVE ORDER OF NOVEMBER 4, 1873

This Order provided:

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians"—"and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory"—"be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast."

(Kappler, Ind. Affairs, Laws and Treaties, Vol. 1 (2nd Ed.) pp. 923-924. Appendix "C").

Let us at the very outset inquire: Why was the Executive Order of 1873 promulgated? The Quinaielt, Quileute, Hoh, and Queets Indians were all entitled under the Treaty of 1855-1856. The Circuit Court of Appeals so holds, as that opinion

states that the Hoh was but a band of the Quinaielt, and the Queets but a part of the Quileute tribe (R. 638), and the Ozettes numbered but 44.

If the Circuit Court of Appeals is correct in its construction of the Allotment Act of March 4, 1911, then the reservation was enlarged from 10,000 acres to 224,000 acres simply to take care of 44 Indians.

We do not believe that this is a proper construction of this order, as applied to subsequent legislation. If the Quinaielt, Quileute, Hoh and Queets Indians were entitled under the Treaty, which they were, why then was there any necessity for the Executive Order of November 4, 1873? The Circuit Court of Appeals does not answer that question.

The only conclusion to be drawn from the opinion is that the Executive Order was promulgated and the reservation enlarged solely to provide for 44 Ozette Indians.

> "All statutes must receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd consequence."
>
> *Hawaii v. Mankichi*, 190 U. S. 197.

We are completely at loss to comprehend the Circuit Court of Appeals' attitude relative to this

Executive Order. In the Halbert opinion the Court sets it out (R. 639), but fails to construe or pass upon its meaning.

The Solicitor for the Interior Department in his opinion of September 2, 1916, (Exhibit No. 9), when the status of all these petitioners who live on cific Coast, members of the Quinaielt, Quillehute, Shoalwater Bay, Grays Harbor, at Dahlia near the mouth of the Columbia and at Oakville, was no different than it is today, concluded:

> "While the Quinaielt Reservation is one of the largest west of the Cascade Range, it was evidently not intended that all the unattached Indians as far east as that range could secure rights on that reservation. The more reasonable view is that *only the Indians of the tribes or bands on the immediate coast of Washington and those affiliated therewith were contemplated.*"

He thus excludes the Indians of the Puget Sound region.

He quotes the Superintendent of Indian Affairs for Washington Territory recommending the enlargement of the Quinaielt Reservation in 1872, the very recommendation which caused the Execu-

tive Order of November 4, 1873, (Appendix "C") to be promulgated:

> "All the tribes made parties to this treaty, together with the remnants of the Chehalis, Humptulups, Shoalwater Bay, and Chinook tribes, residing along this coast south of the reservation to the mouth of the Columbia River, and the Makah tribe, residing at Cape Flattery, north, are emphatically fish-eaters and draw their subsistence almost wholly from the water, and therefore have but little taste or desire for agricultural or land productions."

This defines the fish-eating Indians on the Pacific Coast. (See also definition of Superintendent Johnson [R. 502]).

The Solicitor (R. 298) quotes further from that same recommendation:

> "The reservation thus enlarged would afford two more fisheries on the Pacific Coast, and perhaps several others around Lake Quainaielt, and would afford occasional patches of agricultural and grazing lands, *and upon it should be collected not only the three tribes named*, but also all the other tribes and bands of fish-eating Indians on the Pacific Coast, from the south side of Neah Bay reservation to the mouth of *the Columbia River*; all of whom could find

room and homes on this enlarged reservation." (Italics ours).

In these cases respondent and the Circuit Court of Appeals would limit allotments to the Indians who live north of Grays Harbor. They would do this now, in face of the action of the Department in the past in following the Solicitor's opinion and in allotting members of these bands south of Grays Harbor without the necessity of adoption into the Quinaielt tribe. It might be said that the petitioners who live on the little Oakville Reservation do not live on the immediate Coast, but live 30 miles inland from Grays Harbor (See map p. 9). But we have shown that the Upper Chehalis, though they used different fishing methods, were nevertheless affiliated with the Lower Chehalis tribe (R. 581), the names Upper Chehalis and Lower Chehalis having been applied by the whites for convenience (R. 427). They fished down to the mouth of the Chehalis River (R. 581). The Solicitor held that members of most of the 40 tribes then applying were not entitled to allotment because they already had allotable reservations set aside for them and because they were not fish-eating Indians on the Pacific Coast within the meaning of the Executive Order of 1873.

But the opinion (R. 295-326), as well as the correspondence set out therein, shows very conclu-

sively that the rights on the Quinaielt Reservation of the fish-eating tribes on the Pacific Coast have never been questioned. They have never been questioned until these petitioners sought allotments. As we have said, the only reason we can suggest is that the reservation group of Indians have exerted their influence upon the local agents. Of course the Department may still have the view it pressed from 1912 to 1924, that timber land is not allotable, and that the less allotted the better, but since that quesion was decided in he case of *Tommy Payne v. United States*, 264 U. S. 446, this would hardly seem possible.

The Circuit Court of Appeals quotes some of Allotting Agent Roblin's testimony relative to the Act of March 4, 1911, but overlooks his testimony wherein he discusses the Executive Order of November 4, 1873. (Appendix "C"). He testified:

> "That possibly half a dozen of the Indians at Quinaielt are living on their allotments; that the Act of 1911 was passed to provide for the same things as was the Executive Order of 1873; they were passed and supposed to *ne* in conformity one with the other, for the purpose of clearing up a controversy as to whether or not the subsequent creating of small reservations for Osette, Quileutes and Hoh tribes, would bar them from exercising their treaty rights un-

der the Treaty of 1855-1856—not for the purpose of one repealing the other; that the Opinion of the Solicitor made in 1916, wherein as he says 'that the fish-eating Indians of the Pacific Coast are not intended to include all the tribes or bands, but those Indians of the Pacific to the mouth of the Columbia River' is absolutely in conformity with the recommendation of W. W. Miller, superintendent of Indian affairs in charge of Western Washington in 1865; recommending the creation of a reservation, exactly in conformity with the letter of the Commissioner of Indian Affairs to the President, and in conformity with the Executive Order." (R. 446-7). or that part on page 448 of the record:

"That he does not think it would be necessary for members of the Lower and Upper Chehalis or Chinooks entitled to allotment on the Quinaielt reservation under the Executive Order of 1873 and the Allotment Acts, and regardless of whether or not they are members of a particular band to seek the recognition of the Quinaielt tribe before being allotted; that his previous testimony was not based on the assumption that only members of the Quinaielt tribe have the say about allotment of land on the Quinaielt reservation; that it is not his belief that Indians whose names appear on the Quinaielt census roll for allotment, but who live at Bay Center,

or elsewhere, would be required to appear before the Quinaielt tribal council for recognition before being allotted; and the same condition prevailing except that the applicant's name did not appear on the census roll of the Quinaielt Agency, it would be necessary for him to show recognition once existing by the tribe to which he claimed membership; that is, it would be necessary for him to show he was a member and recognized as such, of some one or several of the tribes entitled to allotments on the Quinaielt reservation."

Much of the cross examination in which the above quotations appear is worthy of the Court's attention. Agent Roblin corrects a number of misconceptions created by his direct testimony.

In the opinion in the Provoe case (R. 668) the Circuit Court of Appeals again refuses to construe the Executive Order of November 4, 1873.

"nor do we wish to be understood as determining whether or not Upper Chehalis Indians are provided for by the proclamation." (R. 688).

But only a few lines back the Court said:

"As we have indicated, her right to an allotment under the general allotment law, as modified by 25 U. S. C. A. Section 184, concerning the right of a child of an Indian mother and a

white father, which we think excuses residence in the reservation as a prerequisite to allotment in such cases, depends upon the question as to whether her mother was a recognized member of one of the tribes for which the Quinaielt Indian Reservation was set aside, and this depends in part upon the terms of the proclamation of November, 1873."

Mary Francis Provoe, the daughter of a full-blood Chehalis Indian, probably Upper Chehalis, is thus not entitled to allotment on the Quinaielt Reservation, unless her mother is found to be a Lower Chehalis, even though the court in effect says the Quinaielt Reservation may have been set aside to provide for the Upper Chehalis too. The Court thus first finds that her rights depend in part upon the Executive Order of November 4, 1873, and then refuses to construe that proclamation. Surely the Circuit Court of Appeals did not grasp the inconsistency of its own words.

We contend that the Executive Order is the backbone of a large number of these cases. These remnant bands of Southwestern Washington had refused to sign the Treaty of 1855 and 1856, though they were present at the negotiations, and we have shown that their refusal was not unreasonable. From 1856 to 1873 the whites moved in and took all their land on the coast of Washington, from

the Olympic Mountains to the Columbia River, and they were not compensated for it in any way. The Indian Wars and the Civil War followed by the reconstruction problems prevented any further negotiations with these then far distant Indians. The Act of March 3, 1871, (Appendix "B"), prohibited the making of any more treaties with Indian tribes. So the government was faced with the question of what to do about these Indians of Southwestern Washington. It had never been the policy of our fair dealing government to take valuable lands from the Indian tribes without some form of compensation. But, as we said, it was not possible to make a treaty with them. In these years since the treaty the coming of the whites had brought stable government. It was now (in 1872 and 1873) possible to fulfill Governor Stevens' plan to put all these Indians on one reservation in the Quinaielt country. And so it appears the Executive Order of November 4, 1873, (Appendix "C"), was promulgated, in lieu of a treaty. It enlarged the reservation to 224,000 acres, 22 times its original size, and provided for the tribes who signed the treaty and for the "other fish-eating Indians on the Pacific Coast." As we said, the Circuit Court of Appeals would have us believe that it was then enlarged to provide for 44 Ozette Indians! It may be asked why the tribes of fish-eating Indians were not specifically named. The answer is found in the

very report of the Superintendent of Indian Affairs for Washington Territory recommending this enlarged reservation (R. 297-299). They, the Chehalis, Humptulups, Shoalwater Bay and Chinook Indians, were mere remnant bands in 1872. (See R. 297, bottom of page). But the reservation as enlarged was not habitable and it does not appear that the government wished to expend the money to make it habitable. The Indians would have starved to death had they removed to the reservation voluntarily. So the Indians have been left where they were to make such a living as they could, waiting for the day when their reservation should be cleared of its timber so that they could go upon it and make their homes. They have had a long wait. In 1887 the General Allotment Act was passed and they expected to receive their allotments. But their reservation was not surveyed. It was not surveyed until 1903. (See Report of Harry F. Liston, Superintendent of the Quinaielt Agency. Annual Repts. of Dept. of the Interior, Indian Affairs, Part I). We have discussed the subsequent delays.

The aids to the construction of this Order are (1) the past history of the Department in allotting members of these tribes or bands without adoption into the Quinaielt tribe or prior residence on any reservation, many of the petitioners being direct descendants of these allottees and (2) the opinion

of the Solicitor for the Interior Department of September 2, 1916, (R. 295-326), and (3) the opinion of the trial court (Part R. 326 to 337).

We earnestly believe that the Executive Order of November 4, 1873, was promulgated in lieu of a treaty with the Indians of Southwest Washington.

> "Where the language of a statute (an Executive Order in these cases) is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy." *Smith v. Townsend*, 148 U. S. 490.

And being in lieu of a treaty it should be treated as a compact between the Indians and the Government. The consideration on the part of the Indians was the valuable territory and fisheries taken from them. It should be interpreted liberally in favor of the Indians. Certainly it should not be completely disregarded.

The General Allotment Act of February 8, 1887

(24 Stat. L. 388, 25 U. S. C. A. c. 9, Sec. 331, et seq.)

The lower court held that these cases came under the Special Allotment Act of March 4, 1911.

(36 Stat. L. 1345) (Appendix "F"). However we have always contended that petitioners are entitled to allotments under the General Allotment Act of February 8, 1887, also.

The Circuit Court of Appeals holds that this allotment act makes residence upon the reservation a prerequisite for allotment. This conclusion is based upon Section 1 of the Act, the Court saying:

> "It will be observed that this section requires that the tribe or band of Indians be located upon the reservation and that the individual seeking allotment be located thereon. As was said by Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, in *Lemieux v. United States*, 15 Fed. (2nd) 518, "No case has been cited, and we have been unable to find any which holds that a tribal Indian, living apart from the tribe and off the reservation, is entitled to an allotment under section 1 of the Act of 1887, and the language of that act seems to preclude such a holding." No one of the appellees resides upon the Quinaielt Reservation. This fact would justify and require the Secretary of the Interior to deny their applications for allotments under the general allotment law and would require a denial of their application by the District Court."

Thus the only authority for this construction

is the dicta in the case of *Lemieux v. United States*, 15 Fed. (2nd) 518. We have already discussed this case (page 172), but we will mention that Judge Sanborn referred to "a tribal Indian living apart from his tribe and off the reservation." The petitioners, while living off the reservation, are not in any true sense living apart from their tribes. The little settlements in which they live are the homes of many other Indians of their own tribes or bands, and many of these Indians with whom petitioners are associated have been allotted on the Quinaielt Reservation while living in the same settlements.

The Circuit Court of Appeals does not construe the entire act and particularly it does not construe Section 6 of the act set out as Appendix "A."

It would seem from Section 6 of the act that two classes of Indians are provided for:

First: The act applies to Indians who have been allotted under any law or treaty, or under the act itself.

Second: The act applies to Indians who have not been allotted, whether such Indians have or have not been members by birth or otherwise of any tribe of Indians. It grants to both classes the rights, privileges and immunities of citizens, "*without in any manner impairing or otherwise affecting the*

right of any such Indian to tribal or other property."

The United States Supreme Court, so far as we have been able to determine, has never construed the Act of February 8, 1887, (24 Stat. L. 388, 25 U. S. C. A. c. 9, Sec. 331 et seq.), in its entirety and has never passed upon Section 6. It seems to us that Section 6 is a savings clause, the purpose of which is to protect the rights of Indians who, though living as Indians, do not reside upon a reservation.

However, the Act of February 8, 1887, has been construed by the Department in granting allotments before and after March 4, 1911, to a great many Indians who never resided upon any reservation (R. 466). In as much as the tribes or bands of Southwestern Washington have not been able to go upon their reservation because of its uninhabitable condition, the strict and technical construction of the Circuit Court of Appeals on the question of residence is neither reasonable nor just. The Supreme Court of the United States, in the case of *Hy-yu-tse-mil-kin v. United States*, 194 U. S. 401, and this same Circuit Court of Appeals in the case of *Bonifer v. Smith*, 166 Fed. 846, construing the Umatilla Allotment Act, held that residence was not a prerequisite for allotment. There is very much more reason why the same liberal rule should be

applied to the construction of the allotment acts under consideration in the present cases.

ACT OF JUNE 7, 1897.

This act provides as follows:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right." (30 Stat. L. 90 Sec. 1) (25 U. S. C. A. Sec. 184).

This act was in fact a piece of remedial legislation enacted to correct the inequity of the Act of August 9, 1888, (25 Stat L. 392), and to give the children of a white man and an Indian woman recognized by the tribe the same rights to tribal property as were given to the children of a white woman and a recognized Indian man under the last cited act. Until the decision of the Circuit Court of Appeals in the present cases, it had always been admitted that a child of a mixed blood marriage was entitled to his rights in tribal property if this fa-

ther was a recognized Indian. The discussion in the Indian appropriation bill for the fiscal year 1898 clearly sets this out, (Congressional Record, 55th Congress, 1st Session, page 1264), also *Waldron v. United States*, 143 Fed. 413, *Bonifer v. Smith*, 166 Fed. 846, Sioux Mixed Blood Cases, Opinions of the Attorney General, Vol. 20, pp. 742-743; *Pennock v. Commissioners*, 103 U. S. 44; *Jones v. Meehan*, 175 U. S. 1; *Vezina v. United States*, 245 Fed. 411; *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, *United States ex rel. Besaw v. Work*, 6 Fed. (2nd) 694.

The Circuit Court of Appeals ruling upon this act is vague, indefinite and not in accordance with the facts in these cases. This is one of the most serious [redacted] errors.

For example, in the opinion of *United States v. Halbert* (R. 643), 38 Fed. (2nd) page 798, it is said:

> "We do not understand that the appellees rely on this statute as applicable to most of the applicants for the reason that they are not the children of an Indian woman and a white man, but they are grandchildren, and therefore do not come within the provisions" of the statute citing *Pape v. United States*, 19 Fed. (2nd) 219; *Oakes v. United States*, 172 Fed. 305).

The record clearly shows that *both the grand-*

father and grandmother of a large number of the applicants whose rights the Court was therein considering were Indians. This will be shown in our discussion of the individual cases.

We call the attention of the Court to the fact that, in the four Halbert cases, Nos. 141, 142, 148 and 144, the *father* of petitioners in each case is a duly enrolled and allotted Quinaielt Indian, and, if we are to follow the rule cited by the Court in *Pape v. United States*, 172 Fed, 305, they follow the status of their father, not their mother.

The Circuit Court of Appeals does not attempt to decide the cases, No. 146, *Lulu M. Elliott et al v. United States;* 147, *Mary Barichio Petit et al v. United States;* 148, *Dewey Barichio et al v. United States;* 145, *Rose Peers Pickernoll et al v. United States*, by a review of the facts, but decides these cases under the general decision in the case of *Halbert v. United States*. Had that Court gone into the facts in the above enumerated cases, that Court could not have come to the general conclusion that it did, for in these cases both the *father* and the *mother* are *Indians*.

When the Circuit Court of Appeals cites the Oakes case in this connection, that Court again overlooks the fact that, in the case of these petitioners, none have ever abandoned their tribal habitat or status as Indians.

In case No. 151, *Agnes Reubens et al v. United States*, the Court again erroneously applies the Act of June 7, 1897, (30 Stat. L. 60-90) (Appendix "E"). The facts in this case are: That the mother of the petitioners is a duly recognized, enrolled and allotted Quinaielt Indian, and the father of the petitioners is a white man. They were married in the year 1890 (R. 491), long prior to the passage of the Act of June 7, 1897, (Appendix "E"). These petitioners are clearly within the rule as announced in the case of *Oakes et al v. United States*, 172 Fed. 305.

In case No. 152, *Virginia Walkowsky v. United States*, the Circuit Court of Appeals again falls into error on the facts admitted. The decision of that Court (R. 646-649) finds the mother of petitioners a half blood Indian, when in fact she is a full blood. The Court first finds she is a Chinook Indian following the tribe of her father, then finds her mother to be a Chinook Indian, after first finding her mother to be a Lower Chehalis Indian. Though her mother may have become a Chinook by her marriage to Mrs. Walkowsky's full blood Chinook father, nevertheless Mrs. Walkowsky was a Lower Chehalis "by blood and not by adoption." Mrs. Walkowsky was unnecessarily adopted into the Quinaielt tribe before these children were born. She was a Lower Chehalis by blood. The Lower Chehalis are enrolled with the Quinaielts and by

stipulation are entitled to allotment (R. 441). In any event the mother of the petitioners was married to the father of the petitioners, a white man, January 9, 1893 (R. 521). The Circuit Court of Appeals cites the Oakes case in this connection. How that much abused decision is a bar in this case, is beyond our power to imagine. In this Walkowsky case we have a full blood Indian woman, (herself and eight of her children allotted), applying for three other children born of a marriage consummated prior to 1897. None of petitioners ever abandoned their tribal habitat, mode of living or status as Indians. All are additionally protected by the Executive Order of 1873. We ask the Court to contrast the facts in this case with the facts in the Oakes case, and we have no doubt but the Court will agree with us that the Oakes case is a much abused decision urged as a bar under every conceivable set of conditions and circumstances.

In cases 149, *Edna May Elliott et al v. United States;* No. 150, *Charles G. Elliott v. United States,* the fathers of petitioners are Indians, and under the ruling of *Pape v. United States,* 19 Fed. (2nd) 219, petitioners follow the status of their fathers, enrolled and allotted Indians (R. 255).

In case No. 153, *Lizzie Rolfson et al v. United States,* it seems to us that the Circuit Court of Appeals goes to the extreme in denying her two chil-

dren born of a marriage with a white man, said marriage having taken place in the year 1887. The trial court finds that Lizzie Rolfson from birth was a recognized member of the Lower Chehalis tribe of Indians (R. 393 and 652). It was further stipulated that Lower Chehalis Indians were entitled to allotments (R. 421). Her two children born of a marriage to a white man prior to June 7, 1897, are denied allotments because they are American citizens (R. 651).

While the case of *Oakes v. United States*, 172 Fed. 305, is not cited in this connection, it is by inference cited by the reference to the Walkowsky case. We submit that, under the facts in this case, these petitioners are within the ruling in the Oakes case, and squarely within the ruling of the cases of *Bonifer v. Smith* (166 Fed. 846), *Vezina v. United States* (245 Fed. 411), *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, and *United States ex rel Besaw v. Work*, 6 Fed. (2nd) 694. From the latter case, the facts in the instant case cannot be distinguished.

The only remaining case is that of No. 154, *Mary Francis Provpe et al v. United States*. The difficulty in denying these petitioners is best shown by the samewhat extended comment upon this case (R. 653 to 670).

In this case it is to be noted that petitioners are children of an Indian father and mother, the

father a Cowlitz and the mother an Upper Chehalis, married long prior to the Act of June 7, 1897. Mary Francis Provoe, the mother of petitioners and herself a petitioner, is admitted to be an Upper Chehalis Indian, now living with her family on the small Executive Order Chehalis Reservation. Another of the petitioners lives at Moclips, Washington, just outside of the Quinaielt Reservation (R. 597), the home of many members of the Quinaielt Tribe (R. 413).

We have discussed the case at length in other parts of this brief, and there is little more to be said here, except perhaps to show the inconsistency of the Circuit Court of Appeals in stating the children of Mary Francis Provoe must follow the status of their Cowlitz Indian father (R. 656), then declining to follow that rule in cases Nos. 141, 142, 143, 144, 145, 146, 147, 148, 149 and 150.

The ruling of the Circuit Court upon the theory of adoption in this case, is discussed at length on pages 128 to 140. We have also heretofore commented upon the Court's failure to construe the Executive Order of November 4, 1873, (Appendix "C"), in connection with this case.

The application of the Act of June 7, 1897, (30 Stat. L. 60-90) (Appendix "E"), to these cases by the Circuit Court of Appeals is so obviously erroneous that it must be concluded that the record was but hastily examined.

Act of March 4, 1911
(Appendix "F")

We have contended that petitioners are entitled to allotment under not only the Executive Order of November 4, 1873, and the Act of February 8, 1887, but also under the Act of March 4, 1911. The trial court held that, in view of the negotiations at Cosmopolis in which the Chinook, Cowlitz, Upper and Lower Chehalis and the Quinaielts took part and which negotiations culminated in the Treaty of July 1, 1855, and January 25, 1856, it was not a strained construction to assume that those first named tribes, though they did not actually sign the treaty, were the "other tribes of Indians affiliated with the Quinaielts and the Quileutes in the treaty" spoken of in the Act of March 4, 1911. This contention is fully set out in the opinion of the trial court (R. 326-337). To those of us who are acquainted with the History of Washington Territory, it seems very reasonable.

It was certainly the most equitable ruling for it allots only those tribes who had no allotable reservations, and excludes all the tribes around Puget Sound and the Straits of Juan de Fuca which had reservations (See Map). The Shoalwater reservation is but a section or so of land. We have shown in the statement of the case that the Chehalis Reservation at Oakville was not allotable. There are references to it in the early reports. Before the

promulgation of the Executive order of 1873 (Appendix "C"), the local officers believed it was intended for the tribes that did not sign the treaty. However, only a small part of the Chehalis Indians ever lived upon it and it was not formally set aside by Executive Order until 1886. By Executive Order of October 1, 1886, 471 acres were set aside for school purposes, and the remaining 3,753 acres, as originally surveyed, were abandoned to Indian homestead entry. Thirty-six Indians, not ancestors of petitioners, made homestead selections covering all the land. (Handbook of American Indians, Vol. II. Bureau of American Ethnology Bull. 30, p. 387). Respondent does not contend that it has any bearing on these cases.

The Circuit Court of Appeals does not share the trial court's view that the Chinooks, Shoalwater, Cowlitz and Upper and Lower Chehalis Indians, who met with the Quinaielts at the Cosmopolis Treaty negotiations, were affiliated with the treaty signing Indians within the meaning of the Act. The Court says:

> "Moreover, it should be noted that there is no evidence as to what tribes were represented at the final meeting at Olympia, nearly six months after the Cosmopolis negotiations were had, other than the fact that the treaty was

signed by the Quinaielt and Quileute Indians." (R. 664).

As a matter of fact, the treaty itself shows that the Quinaielts signed the treaty on the Quinaielt River, and it was signed by the Quileutes at Olympia eleven months after the Cosmopolis negotiations. This raises an interesting question. A number of Indians testified for both parties in these cases and referred to the Quinaielt and Quileute Treaty. The only part of the treaty any of them could tell about was the Cosmopolis meeting. A few headmen signed the treaty on the Quinaielt River on July 1, 1855, about three months after the negotiations, but the Indians to this day do not seem to be aware of that fact. It appears that the minds of the Quinaielt Indians and Governor Stevens met at Cosmopolis, and that the subsequent signing was a mere formality. So to the Indians and the whites also (R. 385, 386, 440-441) the Quinaielts and Quileute treaty and the Cosmopolis negotiations are synonymous. The Cosmopolis negotiations are unquestionably better known to the white people of the State of Washington than any other Indian treaty meeting in the history of their state. Judge Swan's book, The Northwest Coast, is the best known and most authoritative work dealing with the western part of Washington Territory during the period. His book made the Cosmopolis negotiations famous in local history. In

view of these facts, it seems perfectly logical that Congress had in mind the Indian tribes of Southwestern Washington who had met at Cosmopolis when it used the expression "other tribes in Washington who are affiliated with the Quinaielt and Quileute tribes in the Treaty of July 1, 1855, and January 25, 1856."

However, it should not be necessary for this Court to decide that question. Whether or not the Chinooks, Cowlitz and Upper Chehalis Indians were affiliated with the Quinaielts and Quileutes in the Treaty, they are nevertheless entitled to allotment under the construction of that act placed upon it by respondent. They are entitled to allotments under the Executive Order of Nov. 4, 1873, and the General Allotment Act.

Agent Roblin, witness for defendant, states that the Executive Order of November 4, 1873, the General Allotment Act of February 8, 1887, and the Act of March 4, 1911, should be read together R. 446). He also says that residence upon a reservation is not necessary for allotment under the Act of February 8, 1887 (R. 443). In view of the letter of Secretary Ballinger, (R. 641) and some of the other correspondence set out in the Opinion of the Solicitor for the Interior Department (R. 295-326), the following construction of the Act of March 4, 1911, may be the correct one:

The Act of March 4, 1911, was passed to clear up a particular local situation which had become confused and not to define all the tribes who were entitled to allotment on the Quinaielt Reservation or to exclude those not named. The very wording of the Act suggests this. Between 1906 and 1910 allotments were being made to Chinooks, Cowlitz, Quinaielts and Upper and Lower Chehalis (R. 443, 444). It does not appear from Agent Roblin's testimony that any Hoh, Quileute or Ozette Indians were allotted between 1908 and 1910 (R. 443, 444) although possibly some may have been.

It is to be noted that the Hoh, Quileute and Ozette Indians were provided with separate reservations of their own. These reservations were small ones, not more than a section to a section and a half each. They were set aside to protect the sites of their principal villages.

Prior to the passage of the Act of March 4, 1911, the Indian Office in Washington advised the Agent:

> "No Hoh or Quileute Indian residing upon an Indian Reservation set apart for such Indian's use is entitled to an allotment on the Quinaielt Indian Reservation . . . . But if members of the Quileute and Hoh tribes are affiliated with the Quinaielt Indians, *and are not residents upon reservations* set aside for their particular

use, they are entitled to allotments with the Quinaielts." (R. 303. (Italics ours).

This instruction added confusion to the situation as the Hoh, Ozette and Quileute reservations were not of sufficient size to allot more than 15 or 18 Indian altogether, that is, 5 or 6 on each reservation. So to clear up this local situation the Act of March 4, 1911, was passed.

This construction is exactly borne out by the testimony of Allotting Agent Roblin (R. 446). It should be noted that above instruction shows again the policy of the Department in allotting *non-reservation* Indians.

But the wording of that act was not entirely satisfactory. The expression "other tribes of Indians who are affiliated with the Quinaielt and Quileute tribes in the Treaty of July 1, 1855, and January 25, 1856," was not altogether clear. The trial court, including the Cosmopolis negotiations as part of the treaty, held that the Upper and Lower Chehalis, the Chinooks and the Cowlitz were affiliated with the Quinaielts and the Quileutes in the treaty. The Circuit Court of Appeals, accepting the report of the clearly not-representative Council of 1918, held that they were not affiliated.

Others held the view suggested in the Opinion of the Solicitor for the Interior Department. The Act uses the word "ARE" instead of "WERE."

The Solicitor, after holding that all the tribes "south of the Neah Bay or Makah Reservation to the mouth of the Columbia River" and those affiliated with them should be allotted (R. 324), says:

> "The Indian tribes along the Pacific Coast described as 'Fish-eating Indians' ARE more or less affiliated, although divided into numercus tribes or bands." R. 325). (Capitals ours).

(For the definition of fish-eating Indians by Superintendent of Indian Affairs see R. 297). All the petitioners live between the Makah Reservation and the Columbia River and under the ruling of the Solicitor should be allotted regardless of whether or not they were affiliated with the Quinaielts and Quileutes in the treaty.

To further aid the Court in the construction of this Act we point out that the Indians and the local Indian agent on the ground feared that the Act of March 4, 1911, might be used to exclude many whose reservation rights had never, prior thereto, been questioned. As a result, on April 4, 1912, they had introduced House Bill 22868, which would have completely clarified the situation (R. 320). But, upon the introduction of this bill, the Indian Office wrote:

"The question may be seriously considered at

this time whether the Act of March 4, 1911, supra, was necessary. That is, whether authority did not already exist under the treaties mentioned and the Executive Order of November 4, 1873, to allot on the Quinaielt Reservation Indians of the tribes specifically mentioned in the act of March 4, 1911. It is not seen, therefore, how this act can be construed or regarded as in abrogation of or placing any limitation on the rights of various so-called fish-eating Indians of the Pacific Coast to allotments on the Quinaielt Reservation. The act should be read in conjunction with the prior treaties and the executive orders rather than using it as a basis for excluding from allotment on the Quinaielt Reservation members of the fish-eating tribes not specifically named in its provisions or who cannot be shown as clearly coming within the phrase 'or other tribes of Indians in Washington, who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, (25) (Court's (300) correction) 1856' . . . .

"In view of the treaties, executive orders and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary." (R. 319-321).

This opinion was so satisfactory to everyone that the bill was dropped. After preventing the passage of that bill, respondent comes before a court with very poor grace in asking for the denial of these allotments on the ground that the fish-eating tribes or bands to which petitioners belong were not affiliated with the Quinaielts and the Quileutes in the Treaty of 1855 and 1856.

Let us see how the Circuit Court of Appeals treated the Act of March 4, 1911, (Appendix "F"). That Court, first of all, overlooked the local situation, the allotting history of the reservation, and the testimony of government's own witnesses, and held that residence upon the Quinaielt Indian Reservation was a prerequisite to allotment under the General Allotment Act of February 8, 1887. This was done solely on the dicta in the case of *Lemieux v. United States*, 15 Fed. (2nd) 518. The Court then took up the Act of 1911 and held that its only purpose was to substitute residence upon one of the little northern reservations for residence upon the Quinaielt. But the Court, after it held that the Chinook, Cowlitz and Chehalis were not affiliated with the Quinaielts and the Quileutes in the treaty of 1855 and 1856, and since the one-section Chehalis Reservation at Oakville and the one-section Shoalwater Bay Reservation were not mentioned in the Act, says that residence on the last two named

reservations could not be substituted for residence on the Quinaielt Reservation. This makes the Act of March 4, 1911, an exclusion act, a construction diametrically opposite to that of the Department in 1912 (R. 320) which prevented the legislation that would have clarified the whole situation.

Tracing the reasoning of the Circuit Court of Appeals, in the Halbert opinion, the Court says:

> "Under the general allotment act the Indians to whom this reservation was made and who resided thereon were entitled to allotments therefrom. Under the same law Quileute Indians residing upon the Quileute Reservation, Hoh Indians residing upon the Hoh Reservation, Quit Indians residing upon the Quit Reservation, were entitled to allotments from these reservations specially set apart for their use, but these reservations were so small that it would be impossible to give each Indian residing thereon the acreage authorized by the general allotment law. By moving from these small reservations to the Quinaielt Reservation the Indians for whom this reservation was established would be entitled to an allotment under the general allotment law. The Act of March 4, 1911, supra, however, provided that the Indians described in the act 'who may elect to take allotments on the Quinaielt Reservations, rather than on the

reservation set aside for these tribes, should have an allotment made to them on the Quinaielt Indian Reservation.' These allotments the Secretary was directed to make 'under the provisions of the allotment laws of the United States.' It is a general rule of law that a party is put to his election only when he has two inconsistent rights. In view of this fact it must be apparent that the Indians who were by this act given a right of election as to whether they would take an allotment upon the special reservation set apart for them or from the larger reservation, must have had a right to selection upon the smaller reservation. In order to have a right to selection upon a smaller reservation it is necessary that the individual be located thereon. The right given to such an Indian by the Act of March 4, 1911, supra, was the right to select an allotment upon the larger reservation without the necessity of residence on that reservation. The effect of this legislation then is to declare a residence upon one of these smaller reservations equivalent of residence on the larger reservation." (R. 639).

We call the Court's attention to the fact that there is no Quits Reservation. This is another example of the inaccuracy of that opinion on questions of law and fact.

In regard to the narrow construction of the word "elect" in the act, would it not be just as fine reasoning and more in keeping with the facts to say that the Hoh, Quileute, Ozette, Chehalis and Shoalwater Indians, who had these small reservations, protecting their village sites (R. 642), (except possibly the Chehalis Reservation which was almost abandoned) had rights on these reservations, though, in order to make a living, they did not actually live upon them? In other words, we mean that they had rights upon these small reservations because they were members of the bands or tribes that lived upon them and for which they had been set aside, and could elect to take allotments on the large Quinaielt Reservation rather than upon the small one-section reservations set apart for them. This would be in accord with the instruction quoted on page 114. The United States Supreme Court in the case of *Hy-yu-tse-mil-kin v. United States*, 194 U. S. 401, and this same Circuit Court of Appeals in the case of *Bonifer v. Smith*, 166 Fed. 846, held that the Umatilla, Cayuse and Walla Walla Indians had rights to allotment on the Umatilla Reservation, even though they did not live upon the reservation and even though the Umatilla Allotment Act, on its face, seemed to demand residence on a reservation much more than any of the acts in the present cases. In the case of *Bonifer v. Smith*, 166 Fed. 846, an allotment was allowed

a mixed blood Indian residing at the Dalles, Oregon, *150* miles from the reservation, outside the tribal habitat and outside of the territory ceded to the government in the treaty.

The Circuit Court of Appeals has a difficult time construing the term "other tribes affiliated, etc." In the Provoe opinion (R. 661), the Court says:

> "The general words 'other tribes affiliated' in the statute are limited by the special words in the statute, naming particular tribes immediately preceding the general phrase 'other tribes,' etc.; under the familiar rule of statutory construction of *ejusdem generis*, to other tribes related or affiliated, as the Hoh, Quileute and Ozette Tribes are, or were affiliated with the Quinaielt and Quileute Tribes (*Hills vs. Joseph*, 229 Fed. 865, 868, 869). The Hoh Indians were a band of Quileute Indians living at the mouth of the Hoh River, about fifteen miles south of Lapush, the main seat of the tribe on the west coast of Washington." (In the Halbert opinion the Court says that the Hoh Indians are a band of the Quinaielts, doubtless an inadvertence. Correction ours). "In 1905 they had a population of 62 (No. 1 Hand Book of American Indians, Bureau of Ethnology, p. 556, published in 1910). The Quits similarly were a

subdivision of the Quinaielt Tribe. It would thus appear that the Quits were affiliated with the Quinaielt Indians in the same way that the Hoh Indians were affiliated with the Quileute Indians. That is to say, both the Hohs and the Quits were tribes or bands of tribes signing the treaty and were by the terms of the treaty bound thereby (See treaty quoted in Halbert v. United States, supra, 12 Stat. L. 971). The phrase in the statute, 'other tribes affiliated,' etc., is evidently applicable to the Quit Tribe and this fact gives sufficient meaning to the phrase to justify its use and satisfy its terms, even if there were no other tribe similarly affiliated with the Quinaielt and Quileute Tribes in the treaty and not specifically mentioned therein" (R. 661).

Thus the Court is very careful to set out its rules of construction, but in searching for some tribe not mentioned by name, in order to explain the use of the term "other tribes of Indians in Washington," all it can find is one tribe, the Quits. Why was the plural "tribes" used for just one band? The absurdity of such a construction is much more manifest when we realize that the Quits are a band of the Quinaielts whose principal village is Queets on the Quinaielt Reservation, and, being a part of the Quinaielt tribe covered by the

treaty, their rights on the reservation have never been questioned.

Is not the construction of the trial court (R. 326-337) much more simple and reasonable? The trial court does just what Allotting Agent Roblin, witness for respondent, says should be done (R. 446). He construed the Executive Order of 1873 and the Act of March 4, 1911, in "conformity one with the other," and "not for the purpose of one repealing the other" (R. 446), and allotted these members of the tribes of Southwestern Washington. The Circuit Court of Appeals refuses to consider or construe the Executive Order of November 4, 1873, and gives no reason for its refusal. This we believe is error.

Respondent criticised the lower court for construing the word "or" as "and." The expression "or other tribes of Indians in Washington, etc." would be meaningless if that were not done.

> "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and' and again 'and' as meaning 'or.' *United States v. Fisk*, 18 U. S. 243, 3 Wall. 445.

The opinion of the trial court reconciles the treaty, the Executive Order, and the Act of March 4, 1911.

"Other acts on the same subject, and the connection of the words in the act in question, may be reviewed to determine the true intent of a provision in an act of Congress." *United States v. Farden*, 99 U. S. 10.

"Where there are two acts relating to the same subject, effect is to be given to both if practicable." *Chicago, Mil. & St. Paul Ry. Co. v. United States*, 127 U. S. 406.

The construction of the trial court is in conformity with the opinion of the Solicitor for the Interior Department (R. 295-326). It is by far the more equitable of the two constructions. It gives allotments to the members of all the tribes for whom the reservation was set aside.

"The interpretation of a statute is often to be sought from the surrounding circumstances and preceding history." *Guarantee Ins. Trust & S. D. Co. v. Sellers*, 123 U. S. 276.

The construction of the Circuit Court of Appeals would exclude all the tribes south of Grays Harbor. If that construction is the correct one, the whole policy of the Department since 1906 has been wrong and the Quinaielt Indians have a just claim against the government for the value of the 1,000 allotments already given to non-reservation Indians, and for the value of the several hundred

allotments given in the past without adoption to members of the tribes of Southwestern Washington.

"Practical construction given to laws should have great weight in determining doubtful questions." *Bank of the United States v. Halstead*, 6 U. S. 264, 10 Wheat. 61.

"Practical interpretation of ambiguous statute by executive department charged with its administration is entitled to highest respect and, if acted on for a number of years, will not be disturbed except for very cogent reasons." *Swendig v. Washington Water Power Co.*, 265 U. S. 322.

The following record citations show that many of the witnesses for both parties who had been allotted on the Quinaielt Reservation never have resided upon any reservation. Many of them were never adopted into the Quinaielt tribe (R. 398, 403, 405, 408, 411, 413, 420, 421, 422, 425, 466, 472, 485, 488, 491, 507, 513, 521, 522, 526, 534, 569, 572, 573).

Finally the construction of the trial court gives effect to the Executive Order of November 4, 1873, and to the history of the Indians of Washington, and in some measure compensates the remnants of

the tribes or bands of Southwestern Washington for the territory taken from them.

> "In construing the terms of a statute, courts must take notice of the history of legislation, and out of different possible constructions select and apply the one that best comports with the genius of our institutions." *Texas and P. R. Co. v. Inter-State Commerce Com.*, 162 U. S. 197, 218.

But we have shown that, regardless of whether or not the Cosmopolis negotiations be considered as a part of the treaty of 1855 and 1856 (though they in equity should be), the fish-eating Indians of Southwestern Washington are entitled to allotment on the Quinaielt Reservation under the Department's own interpretation of the Executive Order (Appendix "C") and the General Allotment Act of February 8, 1887 (Appendix "D").

The allotment acts would fall far short of accomplishing their purpose in this locality if the construction of the General Allotment Act and the Act of March 4, 1911, as handed down by the Circuit Court of Appeals, be sustained.

Must Petitioners Be Adopted Into the Quinaielt Tribe to Qualify for Allotments?

The Circuit Court of Appeals denies petitioners' allotments, not only because they do not reside upon the Quinaielt Reservation, but also because they have not been adopted into the Quinaielt Tribe. The District Court held that it was sufficient that petitioners are recognied members of the tribes or remnant bands for whom the reservation was set aside. The theory of the Circuit Court of Appeals on the question of adoption is best expressed in its decision in the case of *United States v. Rolfson et al.*, 38 Fed. (2nd) 806, and at page 807 it is said:

> "The children of Lizzie Rolfson are American citizens and are not entitled to an allotment unless they were adopted by the tribe."

In coming to the above conclusion the Court first ignores the Act of Congress of June 2, 1924, (C. 223, 43 Stat. L. 253) (Appendix "G"). This error or oversight is so apparent that no argument is necessary.

Secondly, the Court overlooks the rules and regulations of the Department of the Interior made in the year 1904 with amendments thereto (Appendix "H"), which direct that the children of a duly enrolled and allotted parent or parents are

entitled to enrollment and allotment without any necessity of adoption.

Under these allotment instructions and the policy of the Department of the Interior for the past twenty-six years, the petitioners in the cases No. 141, Hilary Halbert Jr. et al.; No. 142, Rich Harbert; No. 143, Vernon Sidney Halbert; No. 144, Sidney E. Halbert; No. 146, Lulu M. Elliott et al.; No. 147, Mary Barichio Petit et al.; No. 148, Dewey Barichio et al.; No. 149, Edna May Elliott et al.; No. 150, Chas. G. Elliott et al.; No. 151, Agnes Reubens et al.; No. 152; Virginia Walkowsky et al.; No. 153, Lizzie Rolfson et al.; are all entitled to enrollment and allotment, and the theory of adoption cannot possibly enter into the consideration of the matter as the blood status of these petitioners has been fixed, and to say that the child of a duly enrolled and allotted Quinaielt Indian must further be adopted as a Quinaielt Indian is contrary to all established rules of law and precedent.

In this case of Virginia Walkowsky et al., No. 152, where the mother and eight of her children were enrolled, allotted and unnecessarily adopted into the Quinaielt Tribe, and her three younger and after born children of the same father were denied allotment, a peculiar situation prevails. To show how contrary to law and the ruling of the Department of the Interior and the Department

of Justice is this opinion, we will cite to the Court petitioners' Exhibit No. 15, which is a ruling of the Department of the Interior, dated December 16, 1925, holding that the after born children of an Indian adopted into the Quinaielt Tribe are entitled to an allotment without further action of the tribe (R. 616).

Again in the case of *Frank Mounts et al. v. United States*, District Court, Washington, No. 3 38, wherein the Attorney General of the United States upon November 6, 1929 (Appendix "J"), recommended a consent decree in favor of the plaintiffs, the minor children of Frank Mounts, it is said:

> "Investigation of this matter develops the fact that Frank Mounts, the father of the plaintiffs, was enrolled by adoption and his adoption and enrollment was approved August 30, 1909. The oldest of the plaintiffs is 19 years of age. It is clear, therefore, that all the plaintiffs were born after the adoption of their father into the Quinaielt Tribe of Indians. It further appears that these people never resided upon the Quinaielt Reservation."

In the face of the foregoing, we cannot understand by what theory and reasoning the three minor children of [illegible]ate Walkowsky Weiss are denied allotment.

The Circuit Court of Appeals had the ruling of December 16, 1925, (Plaintiff's Exhibit No. 15), before it in the form of an exhibit at the time it considered these cases, but in justice to that Court we will state that it did not have the Mounts decision before it as we were not advised of this decision until after the cases were briefed and argued in the Circuit Court of Appeals. The ruling, however, was before that court in the petition for rehearing.

The Circuit Court of Appeals confuses recognition with adoption. In the cases heretofore enumerated by us, there was no necessity of either recognition or adoption, as the blood status of all these petitioners had been fixed. However, there is a vast difference between recognition and adoption, as outlined by the testimony of Allotting Agent Roblin heretofore noted, and he states that recognition in form is valid and, when given, the persons recognized are entitled to their rights to allotment (R. 448-449).

To only two of these cases could the question of adoption possibly apply. These are the cases No. 145, Rose Peers Pickernoll et al., and No. 154, Mary Francis Provoe et al. We have heretofore shown and will hereafter show that even in these two cases there is no necessity for adoption. In the Pickernoll et al. case, both parents are Indians,

and mother are Indians and both father and mother "fish-eating Indians of the Pacific Coast" and "other Indians in that locality" under the Executive Order of November 4, 1873 (Appendix "C"), and are members of "other tribes affiliated" under the Act of March 4, 1911 (Appendix "F").

In the Provoe case not only do petitioners qualify as above, but, furthermore, they were in the year 1912 recognized by the Quinaielt tribe (R. 586, 587), and remained on the roll until 1918 or 1919 when Agent Roblin, according to his own testimony, struck them from the roll without notice. He says:

> "That he was very particular not to notify the members of the Provoe family of that meeting" (R. 607).

It is also a fact that this action was his own idea and he had not been instructed by the Department of the Interior not to notify the parties dropped from the roll (R. 608). That this action was without due process of law scarcely need be mentioned.

Bisek v. Bellanger, 5 Fed. (2nd) 994;

Work v. United States ex rel. Gouin, 18 Fed. (2nd) 820.

The Circuit Court of Appeals goes to the extent of saying that, even though both the father

are enrolled and allotted on the Quinaielt Indian Reservation, their children would have to be adopted into the Quinaielt Tribe. (Case of *Lulu M. Elliott et al. v. United States*, No. 146). The same is true of the Petit family, Case No. 147 (R. 130-136). The Court of Appeals gives no detailed discussion of this case but decides it under the head of the *United States v. Halbert et al.* (38 Fed. [2nd] 795-799).

An examination of the record will show that the Circuit Court of Appeals, in holding that petitioners must be adopted by the Quinaielt tribe of Indians, overlooked the particular local situation here existing, the Executive Order of 1873, the authentic records in the cases, and the admitted facts therein.

The Court, in denying allotments to some of the petitioners, apparently accepts what counsel for respondent urges as "the basic ancestry theory." This theory ingeniously conceived by counsel is somewhat as follows:

"The petitioners are to be denied allotments. We cannot as a bar call forth the non-residence defense, as the tribes for whom this reservation was set aside, and 1,000 Indians already allotted, have never lived thereon owing to its uninhabitable condition until cleared; nor can we refer to the immediate ancestry, as in most cases the parent or par-

ents are allotted upon this reservation, but we can go back to the last ancestor who was allegedly recognized as a member of one of these bands or tribes, or to some full blood Indian. We will then stop the line of Indian descent the moment that ancestor marries into the white race, no matter when, or under what condition, and no matter if in a following generation both the mother and father of the applicant are Indians, and thus limit the Indian status to the full blood Indian ancestor, and that person's children. Thus only the full blood Indian and his or her children may qualify. We will do this in spite of the Act of June 7, 1897, and rely upon the case of *Oakes et al. v. The United States*, 172 Fed. 305, as sustaining this position. We will assume that the fact that the applicants in the Oakes case moved to St. Paul and cast their lot with the white race was an immaterial factor in that case. In the face of the census rolls, which carry the names of some petitioners and their parents and relatives (R. 433, 452), we will answer that the census rolls are inaccurate and not complete. In the face of the allotment roll containing the names of the parents of 95 per cent of the petitioners, we will answer that the allotment roll is not a tribal roll in the sense of showing who are the Indians entitled to allotments (R. 433, 452). We have no roll that does show this, but we can go back two, three or four generations, back to the

days when these bands of Southwestern Washington Indians had tribal organizations, or at least somewhat better ones than they have today, and here find a so-called 'basic ancestor,' and limit applicants' right to being a son or daughter of that person who in most instances died before or at the time of the treaty of 1855, fifty-three years before the first allotment on the Quainaielt Reservation."

This was in effect respondent's argument in the Circuit Court of Appeals. This theory would deprive children of mixed bloods of all tribal rights, regardless of degree of blood, or mode of Indian life.

It is, of course, based upon the hypothesis that it would be possible to show a tribal recognition existing that long ago, long prior to the fusing of these various remnants of tribes and bands into one group. The theory of "basic ancestor" is urged, although petitioners live in their original tribal habitat, most of them in what are Indian settlements to this day. It is shown beyond any controversy that these bands and tribes have had no true tribal organization since the Treaty of 1855 (R. 554, 297), and never had tribal organization in the true sense of same as exemplified by the Sioux, Chippewa, Yakima, and many other tribes of Indians throughout the United States.

So under this very flexible theory of counsel for respondent, the Court, in seeking the basic ancestor under the direction of counsel's argument, need only go back just far enough in each case to find that petitioners do not qualify under the theory advanced.

To substantiate this theory respondent cites the case of *Oakes et al. v. United States*, 172 Fed. 305. We know of no other decision more misapplied than this one. It is urged as a bar under every conceivable set of circumstances or conditions. It is apparent that the Oakes case, so far as applicable to these cases, is in favor of petitioners, and we cite it in this connection.

Petitioners herein never abandoned their home, surroundings, mode of life and their Indian status as did the litigants involved in the Oakes case. The facts in these cases are entirely different, for in our cases we have an Executive Order and a Special Allotment Act, both providing for non-reservation Indians, factors wholly absent in the Oakes case.

The theory advanced by respondents in the Circuit Court of Appeals would deny petitioners their allotments by reason of a situation created and allowed to exist solely through the fault of respondent. Had these Indians been placed upon this reservation, or allowed to go thereon, or had

the reservation been made habitable so that they might have made their homes thereon, these petitioners would be reservation Indians. Had the Indians of this locality been cared for on the reservation set aside for their use and benefit, as have the Indians in many other parts of the country, every one of respondent's contentions would be so untenable that no court could even listen to it.

We have shown, and it is admitted, that the parent or parents of many of the petitioners are duly enrolled and allotted Quinaielt Indians. In other cases their parent, parents and relatives are recognized in their settlements and localities in which they live as members of the bands or tribes for whom this reservation was set aside. Many of the petitioners are now recognized by the Indians who live upon the reservation. Others have been so recognized at various times, as set forth in the argument on the facts in the individual cases.

The trial court refers generally to this question of recognition on page 337 of the record; also in the opinion of that court upon pages 338-375 of the record. The statements and conclusions therein follow the facts and show that the lower court did not confuse adoption and recognition as did the Circuit Court of Appeals.

The trial court held that it would not be necessary for the members of the fish-eating tribes of

Southwestern Washington to be recognized or adopted by the Quinaielt Tribe or Council (R. 337), thus giving effect to the Executive Order of November 4, 1873 (Appendix "C"). The ruling is in conformity with the testimony of Allotting Agent Roblin, a leading witness for respondent, who says:

> "That his previous testimony was not based on the assumption that only members of the Quinaielt tribe have the say about allotment of land on the Quinaielt reservation; that it is not his belief that Indians whose names appear on the Quinaielt census roll for allotment, but who live at Bay Center, or elsewhere, would be required to appear before the Quinaielt tribal council for recognition before being allotted; and the same condition prevailing except that the applicant's name did not appear on the census roll of the Quinaielt Agency, it would be necessary for him to show recognition once existing by the tribe to which he claimed membership; that is, it would be necessary for him to show he was a member and recognized as such, of (410) some one or several of the tribes entitled to allotments on the Quinaielt reservation" (R. 448, 449).

It would seem clear from the testimony of Agent Roblin, as set out herein, that none of the

petitioners needed adoption. If petitioners were members of tribes or bands other than those for whom the reservation was set aside, strangers not contemplated by the Executive Order or the Special Allotment Act, or members contemplated who had voluntarily severed themselves from their Indian status, left the tribal habitat of their band or tribe and cast their lot with the white race, as did the litigants in the case of *Oakes et al. v. United States*, 172 Fed. 305, then perhaps a different situation might be presented. There would then be some justification for the ruling that an adoption would be necessary in order to entitle them to allotments. Even this would be doubtful in cases where the parent or parents were duly enrolled and allotted members of the reservation.

The foregoing, we believe, is the well recognized law as established by the decided cases upon this subject, as well as the rules and regulations of the Department of the Interior.

Having, therefore, shown that petitioners are members of the tribes and bands for whom the reservation was set aside, that they are so recognized, that they still live in their original habitat among Indians, as Indians, never having changed their status except through the gradual change coming through civilization, education and enlightenment, that their parent or parents and many

members of their immediate family have been recognized, enrolled and allotted upon this reservation, the so-called theory of "basic ancestor" and rule of adoption as announced by the Circuit Court of Appeals cannot apply.

Various Tribal Meetings of the Quinaielt Indians

The testimony at the trial of these cases developed that there were at least two, or perhaps three, councils of the Quinaielt Indians or of the Indians on the Quinaielt Reservation.

The first was that of April 4, 5, and 6, 1912, called by the Indian Agent, under instructions from the Department to call a general meeting of all the Indians interested, in order to determine, if possible, what persons, in the opinion of the Indians, were entitled to allotments on the Quinaielt Reservation. It was a general council of representative Indians. Many Indians were passed upon favorably by this council, among whom are petitioners in cases 146, 149, 150, 151 and 154 (R. 494, 495, 511, 586, 587, 590).

Nothing further was done, nor any action taken in this matter until some time in the year 1918 when the Department sent Agent Charles E. Roblin to the Pacific Coast. Among other things, he was instructed to investigate the names passed

upon by the Indians in the 1912 Council (R. 480). Agent Roblin then proceeded to interview individual Indians (R. 607) and secured statements and affidavits from them. His plan, according to his own testimony, was not to notify any of the former applicants of his actions, or to let the applicants know that their names would be presented again to the Indians located at Taholah upon the Quinaielt Reservation. In fact he states he took particular pains not to notify them (R. 605, 606, 607).

After Agent Roblin had interviewed various Indians, none, however, being the 1912 applicants (R. 588, 607), he made a summary of the facts as he found them and then submitted this finding with his own recommendation thereon to 60-odd Indians living on the reservation at the village of Taholah (R. 448, 607). Only six out of these 60-some Indians signed the report (R. 480, 481), in which these few Indians recommended that those who were favorably voted upon in 1912 should be dropped from the rolls. At this time there were 746 allotted Indians of this reservation (R. 437).

It appears that but five Indians out of the 746 allotted Indians approved a still further council in the year 1925, and three of these Indians belonged to one family named Mason, a father and two sons (R. 467). The record is rather vague as to this alleged council.

We do not attach any legal significance to any of these so-called councils, as they were but a mere expression of an opinion given by a group of Indians as to the meaning of the Act of March 4, 1911, and the Executive Order of November 4, 1873, relative to the right to allotments."

As was well said in the case of *United States ex rel. Besaw v. Work*, 6 Fed. (2nd) 694, on page 697, speaking of a similar council of Indians on a like matter, which council had in fact been ratified by the Secretary of the Interior:

> "It will be observed that there is nothing before us to indicate that Besaw, who was a recognized member of the tribe in 1849, ever abandoned his tribal rights or was denied recognition of those rights, except what appears from the resolution of the Council of 1904 to the effect that all mixed-blood Menominee Indians who participated in the distribution in 1849 were barred from further participation in tribal property. This action by the council in 1904 amounts to nothing more than a declaration of interest upon their part as against the interest of mixed-blood Menominee Indians. *It cannot be given the authority of law nor is it even evidential of any agreement entered into at the time of the distribution of 1849.*" (Italics ours).

However, it is well to observe that the 1912 Council was a representative council of all the Indians interested, held in an open public manner, where all were present, including applicants and Departmental officials (R. 494, 495).

The 1918 meeting on the other hand was an effort on the part of Mr. Roblin to show that some of the Indians at least ratified his investigation. In calling and conducting the meeting he apparently made his own rules (R. 608). He called 60-odd reservation Indians together and had six Indians sign the report of the meeting. A part of his instructions were:

> "Your report also should include a statement duly certified by you from the Chiefs and head men of the Quinaielt and Quileute tribes as to what bands and 'other tribes of Indians in Washington were affiliated with them in the treaty of July 1, 1855, and January 23, (25) Court's correction) 1856,' and the location at that time of such bands and tribes" (R. 307).

As it was, he called no Quileute headmen and but a small group of Quinaielts. Both the reservation group and respondent were at that time opposed to making any further allotments. See *Tommy Payne v. United States*, 264 U. S. 446.

LETTER OF R. A. BALLINGER (R. 641-643)

After construing the General Allotment Act of February 8, 1887, (24 Stat. 388) (25 U. S. C. A. 331) and the Special Allotment Act of March 4, 1911, (36 Stat. 1345), to require residence on a reservation, the Circuit Court of Appeals continues:

> "If there is any doubt as to the correctness of the foregoing construction of the statute it is set at rest by the report of the Congressional Committee on the act when it was reported to Congress for adoption. This committee report (61st Congress, 3d Session, 1910-1911, House Reports Vol. 2, Miscellaneous 11, Report No. 2152, reported February 11, 1911), incorporated and was based upon a letter from R. A. Ballinger, Secretary of the Interior, to the Chairman of Indian Affairs of the United States Senate, dated February 18, 1910. This report is as follows:" (R. 641).

The Court then quotes the letter or report (R. 641-643). This letter was not introduced in evidence at the trial. Counsel for petitioners had no knowledge of its existence until it appeared in the Opinion of the Circuit Court of Appeals. Doubtless that Court had a right to consider it as it seems to be a contemporaneous document. However, we

have reason to believe that the Solicitor for the Interior Department had this letter before him in 1916 (six years later) when he wrote his opinion (R. 295-326), and must have given it due and ample consideration.

Had the Circuit Court of Appeals examined more carefully the opinion of the Solicitor (R. 295-326), it would not have given this letter so much weight. This opinion was written six years after the letter of Secretary R. A. Ballinger. No one can read the opinion or the correspondence set out therein and reach the conclusion that residence on a reservation was ever considered a requisite for allotment. Not a single letter refers to Indians residing on a particular reservation. The Solicitor concludes:

> "While the Quinaielt reservation is one of the largest west of the Cascade range, it was evidently not intended that all the unattached Indians as far east as that range could secure rights on that reservation. The more reasonable view is that *only the Indians of the tribes or bands on the immediate coast of Washington and those affiliated therewith were contemplated.* The applicants represented by Mr. Bishop alone and belonging to more than 40 different tribes or bands are said to amount to more than 2,000, and the number may reach 3,000" (R. 324).

The wording of the Act of March 4, 1911, (Appendix "F") is absolutely inconsistent with the idea that residence on a reservation was a requisite. The Act reads:

> "to all members of the Hoh, Quileute, Ozette OR OTHER TRIBES IN WASHINGTON who are affiliated," etc. (Emphasis ours).

The Solicitor says:

> "It may be stated here that the word 'affiliated' was apparently intended to refer to the tribe rather than to the individual. The individual Indians affiliated with the tribes on the Quinaielt reservation would have been entitled to allotment there without further legislation. Therefore, the Act of March 4, 1911, could not have been passed for the purpose of declaring rights already existing. The Hohs and Ozettes mentioned in the Act, as well as other tribes in western Washington, have specific reservations set apart for them, and the members thereof in taking allotments would be limited to those reservations but for the Act of 1911. The Indian tribes along the Pacific coast of Washington, described as 'fish-eating Indians,' are more or less affiliated, although divided into numerous tribes or bands" (R. 325).

The record demonstrates that the Department itself has not followed the letter of Secretary R. A.

Ballinger (R. 641-643) so far as it may possibly apply to non-reservation Indians. It has in fact followed the rule laid down in the case of *Hy-yu-tse-mil-kin v. United States*, 194 U. S. 401, and *Bonifer v. Smith*, 166 Fed. 846. The only other authority for the exclusion of non-reservation Indians, as we have said, is the dicta in the case of *Lemieux v. United States*, 15 Fed. (2nd) 518. The decision of the Circuit Court of Appeals at its best is an extremely technical one, based upon the weakest sort of authority, certainly not the type of decision that should be applied to such a class as these petitioners.

Distinction Between These Cases and the Case of Wilbur, etc., v. United States ex rel. Kadrie

We note the recent case of *Ray Lyman Wilbur, Secretary of the Interior, v. United States ex rel. Kadrie et al.*, (30 Fed. [2nd] 989, 281 U. S. 206, decided by this Court April 14, 1930, upon a petition for certiorari. This decision is to the effect that mandamus will not lie against the Secretary of the Interior to require him to place certain names of Indians upon an annuity roll for money payments after the names had been stricken by an order of the Secretary following an opinion by the Solicitor for that Department.

This petition presents no such question. The petitioners are here proceeding under definite acts of Congress giving them the right to sue for allotments and perforce to ask final judgment for their allotments from the court to which they may appeal.

Upon several occasions this Court has had these acts of Congress before it:

In the case of *Leecy v. United States* (190 Fed. 289) (*Appeal dismissed* 232 U. S. 731), the decicion of the Circuit Court of Appeals for the 8th Circuit said:

> ". . . The Act of February 6, 1901, (31 Stat. 760, c. 217) provides:
>
> "'. . . It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that, as allotments must be reported to the Secretary of the Interior for his approval, the absence of his approval would defeat the suit, when, of course, no one would want to bring a suit if he had that approval.
>
> "'The claim of power under sections 441 and 463 R. S., is subject to the same criticism. Why

authorize a suit, if either of the sections conferred upon the Secretary of the Interior or upon the Commissioner of Indian Affairs general authority conclusive on the courts? Certainly Congress did not mean to authorize the bringing of wholly futile actions. A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so.'"

The Act of February 6, 1901 (31 Stat. L. 760 c. 217), had received further construction in the cases of *Sloan v. United States*, 118 Fed. 283, (*appeal dismissed* 193 U. S. 614), where it is said:

"This section was intended to vest the United States Courts with full authority to hear and *determine every question* arising in any suit brought by a claimant to an allotment; *and the fact that such questions have been decided by the land department adversely to the claimant neither affects the court's jurisdiction nor concludes it on any matter of law or fact.*"

Morrison vs. Work, 266 U. S. 481; *Hy-yu-tse*,

mil-kin v. Smith, 119 Fed. 114, and 194 U. S. 401; *Waldron v. United States*, 143 Fed. 413, and cases cited. Also *Sully v. United States*, 195 Fed. 113.

Summary Of Facts In Individual Cases

Cases 141, 142, 143, 144.

In Case No. 141 *Hilary Halbert, Jr. et al v. United States*, Case No. 143 *Vernon Sidney Halbert v. United States*, and Case No. 144 *Sidney E. Halbert v. United States*, the facts are identical. (Statement p. 34). All petitioners were born, reared and now live in the town of Hoquiam (R. 403, 405, 408), originally an Indian village of the Lower Chehalis Tribe (R. 389 and Handbook of American Indians, Part 1, p. 569). The Quinaielt Indian Agency office is now located here, 25 miles from the Quinaielt Reservation (R. 382). Petitioners were carried on Quinaielt rolls until 1919 when for some unknown reason they were, without notice, dropped (R. 409). All petitioners were allowed selections of allotments in the year 1923 by the Indian Agent, and the writing that showed this stated that they were duly enrolled Quinaielt Indians. (Plaintiff's Exhibit Nos. 4, 7 and R. 408).

In Case No. 142 *Rich Halbert v. United States*, the father of petitioner is a duly enrolled and allotted Indian of the Quinaielt Reservation (R. 398). The father and son now live on the border of the reservation on Lake Quinaielt (R. 398). The

father was an Indian policeman (402), the Indian Agent putting him in charge of issuing fishing licenses to white sportsmen who fish on the reservation, and to save the lake for the Indians (R. 399, 400). The father had a fishing location on the Quinaielt River issued by the Agent (R. 398). Petitioner was carried on Quinaielt Census Roll for many years and dropped in year 1919 for unknown reasons (R. 409). The Indian Agent in 1923 allowed petitioner a selection on the Quinaielt Reservation certifying that he was a duly enrolled Quinaielt Indian (Plaintiff's exhibit No. 2).

All these petitioners are looked upon and considered as Indians by white people and Indians alike (R. 338, 412, 414).

Petitioners had an aunt, Phoebe Alexander, allotted on the Quinaielt Reservation (R. 403, 416, 475); also an uncle, Ethan Allen Halbert (R. 3, 9, 28, 40, 45).

All of the petitioners in the four above entitled cases, their parents and relatives, throughout all their lives have associated with the Indians in the locality of the Quinaielt Reservation and are Indians (R. 339, 381 to 434).

The mode of living of the Halbert families has not changed a particle since the allotment of their parents. One of the Halberts was denied

admission as a member of a lodge because he was an Indian (R. 388).

There is an Upper Chehalis tribal roll kept from 1906 to 1927. None of the Halberts appear on this roll (R. 593) but they do appear on Quinaielt tribal roll (R. 2, 9, 21, 27, 39, 45, 57, 63, 398, 403, 405, 408, 409).

In these cases it is to be noted that there never has been an abandonment of the habitat of the ancestors as in the case of *Oakes et al v. United States*, 172 Fed. 305, but these petitioners and their family lived in or about Hoquiam, originally an Indian villiage, down to and including the present time. It is true that white people have moved in and about them, and they have mixed and intermarried to some extent, but they have always maintained their homes and identity as Indians of this locality.

We contend that the Interior Department itself has placed the indelible stamp of Quinaielt Indians upon this family and that the Department cannot now erase it. Respondent attempts to show that these petitioners, while Indians, are of the Upper Chehalis Tribe. The records of the Department and the trial record completely negatives this idea. Indian Agent Sams in the year 1923, two years before this litigation started, described petioners as

"duly enrolled members of the Quinaielt tribe of Indians." (Plaintiff's exhibits 2, 4, 7 and R. 408).

The Secretary of the Interior on September 24, 1910, speaking of another Indian said:

> "These applicants are mixed blood who belong to that band of the Quinaielt tribe which resides in the vicinity of Grays Harbor on the Chehalis River, Washington." (Plaintiff's exhibit No. 15).

That in the early 80's Colonel Wood was the Agent for the Quinaielt Reservation and at that time he enrolled the Indians living at Hoquiam (R. 393).

H. H. Johnson, who was Superintendent of the Quinaielt Reservation from 1908 to 1913, during the first allotments on this reservation, and who spent seventeen years in the Indian Service, testified:

> "That in case of an Indian, who is enrolled and allotted but is married to a white woman and living off the reservation, at Hoquiam or Bay Center, a child born under these conditions to this couple, the practice would be to enroll such child with the father and certify the child for allotment. The child would be enrolled with the father." (R. 493-497).

CASE 147

The petitioners in case No. 147, Mary Barichio Petit, Norris A. Petit and Ellis A. Petit, have an Indian father and an Indian mother. The father of Mary Barichio Petit is Frank Barichio, an enrolled and allotted Quinaielt Indian, and her mother, Leda Givens, is a woman of part Indian blood. The petitioners, Norris A. Petit and Ellis A. Petit, are children of this Indian women and Paul Petit, a recognized allotted Quinaielt.

CASE 148

In case No. 148 the petitioner, Oscar Brignone, is a grandson of Ellen Amelia Springer, Quinaielt Allottee No. 595. His father was Joe Brignone who formerly resided upon and fished upon the Quinaielt Indian Reservation (R. 572). The petitioner Dewey Barichio is a full brother of Mary Barichio and a son of Frank Barichio. Vinie Wilson, the wife of Dewey Barichio and the mother of petitioners, Romie, D., Leda E. and Andrew B. Barichio, is duly enrolled and allotted on the Quinaielt Indian Reservation (R. 550 to 553, 569 to 573). The Barichio and Petit families live on Shoalwater Bay, Washington, with a colony of mixed Quinaielts and Lower Chehalis there residing, virtually all of whom except petitioners were allotted on the Quinaielt Indian Reservation prior to 1908 (R. 493 to 495, and 498). These families

FAMILY TREE OF BARICHIO AND PETIT FAMILIES

Ah-ha-lah or Elizabeth Springer
Full blood from Shoalwater Bay Quinault Allottee No. 598.
She had Seven Children as follows:

1. Frank Barichio
   Quinault Allottee No. 146
   married to
   Lida Warren
   Para Indian
   - 1. Oscar Barichio, Petitioner in Case No. 148
     married to Vina Wilson, Quinault Allottee
   - 1. Lida G. Barichio
   - 2. Rose O. Barichio
   - 3. Anton G. Barichio
     Three Petitioners in Case 148.

2. Mary Barichio Petit
   Petitioner in Case No. 147
   married to
   Paul Petit
   Allotted as Quinault Res.
   - 1. Harris A. Petit, Petitioner
   - 2. Ellis A. Petit, Two Petitioners in Case 147.

   Note: Both the Mother and Father of Paul Petit were Quinault Indian Allottees (Cowlitz)

2. Violet Barichio
   Quinault Allottee No. 596

3. Lena Calhoun
   Quinault Allottee No. 1
   Married to Wm. Calhoun
   Quinault Allottee
   - They had four children, all allotted on Quinault Res.

4. Ellen Amelia Springer
   Quinault Allottee No. 596.
   married to
   Paul Brignone (White Man)
   - 1. Joseph Brignone
     Died without allotment
     married to a white woman
     - Oscar Brignone, Petitioner in Case. 147
   - 2. Four children, All 4 allotted on Quinault Res.
   - 3
   - 4
   - 5
   - 6. John Brignone, Allotted (?)

5. Tenino Pollard
   Died before Allotment

6. Emma Pollard
   Died before Allotment

7. Mary Franklin
   died before Allotment
   - Had one son Henry Franklin, Quinault Allottee No. 596

are of mixed Quinaielt and Lower Chehalis blood (R. 553), and under the stipulation (R. 421) should be allotted. The Barichio and Petit families are and always have been fishermen and oystermen at Shoalwater Bay, on the Quinaielt River or on the Columbia River (R. 572).

Case 146

Case No. 146 is largely the sequel of two cases, unappealed, tried in the District Court for the Western District of Washington, Southern Division, being No. 324 and No. 325 in said Court, wherein the mother and father of these petitioners were allotted on the Quinaielt Reservation (R. 227 to 228). The father of these petitioners is a fisherman and always has been one. He was allotted by decree of the Federal Court along with a number of his near relatives (R. 130, 137, 485, 490).

What has been said in reference to case 146 applies also to case 149, excepting that in case 149 the petitioners are the children of an Indian father and a white mother; that the father of these petitioners was for many years a fisherman along the Columbia River with the other Quinaielt Indians (R. 514, 516).

Case 151

Case No. 151 is also based to some extent upon cases 324 and 325 in the District Court, wherein the mother of these petitioners was allotted. This

family has always lived where they now live, with a group of Quinaielt Indians living on the Columbia, and being fishermen (R. 267, 273, 342, 490 to 491). The petitioners in this case clearly come within the saving clause of the Act of June 7, 1897, as they are children of a marriage between their Indian mother, Louise E. Henry, and a white man contracted in 1890 (R. 491), seven years prior to the passage of the Act of 1897.

CASE 152

In case No. 152 the petitioners are the children of a full blood Indian woman, who is part Quinaielt and part Lower Chehalis, and a white man, John Walkowsky, being a marriage which was contracted January 9, 1893, more than four years before the passage of the Act of June 7, 1897. The mother of these petitioners and eight of their brothers and sisters are duly enrolled and allotted upon the Quinaielt Reservation (R. 521, 522). These petitioners live with their mother at Shoalwater Bay, Washington, among that colony of mixed Quinaielt and Lower Chehalis Indians heretofore referred to (R. 498, 521, 542).) Under the stipulation, at page 421 of the record, they are entitled to be allotted. They clearly come within the saving clause of the Act of June 7, 1897, as interpreted by *Oakes et al v. United States*, 172 Fed. 303. There was an unnecessary adoption proceed-

ing conducted whereby the mother of these petitioners and the eight allotted children were adopted into the Quinaielt tribe and this adoption was approved by the Secretary of the Interior. These petitioners were not living at the time of said adoption but have been born since. As we have already pointed out, under the rules of the Department set out in the case of *Mounts et al v. the United States*, printed in the Appendix, being No. 385 Equity, Western District of Washington, Southern Division, they are entitled to allotment. The attempt of the respondent to rule these petitioners out of rights on the Quinaielt Reservation, because their mother and living brothers and sisters were needlessly adopted, is a great injustice to three petitioners who are entitled to allotment on the Quinaielt Reservation if any Indians are entitled to be allotted there. But for this unnecessary proceeding, no question could be raised but that these children came under the saving clause of the Act of June 7, 1897. The mother of these petitioners was married the second time and an offspring of this marriage sued for allotment but the trial court held this child not to be entitled to allotment because the marriage of which this child was the issue occurred subsequent to the passage of the Act of 1897, showing that the court carefully considered all these cases on their merits.

CASE 153

In case No. 153, the District Court and the Circuit Court of Appeals allotted the mother of petitioner Lizzie Rolfson because she was a Lower Chehalis Indian. The District Court allotted the petitioners, Eugene and Alvin Smith, but the Circuit Court reversed this ruling. These petitioners, Eugene and Alvin Smith, were born of a marriage between Lizzie Rolfson, a Lower Chehalis Indian, and a white man, which was solemnized in the year 1887, ten years before the passage of the Act of June 7, 1897. They come within the saving clause of the Act of June 7, 1897, as interpreted by *Oakes et al v. The United States*, 172 Fed. 303. They were born and lived most of their lives at Hoquiam, Washington, a former Indian community, where the mother now resides (R. 391 to 393, 472 to 476). In this case the trial court denied an allotment to a child of Mrs. Rolfson, born of a marriage solemnized subsequent to June 7, 1897.

CASE 145

In case No. 145, petitioners are the children of an Indian father, Henry Peers, a Lower Chehalis Indian (R. 519), and an Indian mother, Judith Ducheney (R. 93, 98, 99), a Quinaielt Indian, a sister of Agnes Elliott allotted on the Quinaielt Indian Reservation. Judith Ducheney, the mother, died without receiving an allotment. These pe-

FAMILY TREE Case 145.

Ellen Pollard

Full blood Indian Woman of the Shoalwater Bay locality that three children. She died in 1900.

married to a man, part Indian, part French-Canadian

- Adelin Lahre (deceased) Allottee Number No. 189
- Archie Pollard Conditionally allotted by Circuit Court of Appeals (RCW 5)
- Henry Peers (deceased) Father Married to

Mary Rondeau Ducheney

[illegible] Quinault Tribe married to

Joseph Ducheney

Half Indian, half French Canadian.

They had two children

- Julia or Judith Ducheney (deceased) Mother.
- Agnes Elliott Allotted by decree of Dist. Court West. Dist. of Wash. South. Div. Case ETR E.

1. Sophia Millett Yerkes
2. Ellen Baker { married to a white man and their son Harry Davis Baker is allotted on Quinault Res.
3. Darsy Borg
4. Cora Walter Jones
5. Frances James Payne
6. Elesin James Chenois
7. Maud James Ross

All seven allotted on Quinault Reservation.

1. Mable Peers White
   Petitioner in Case 145
2. Amelia Peers Alden
   Petitioner in Case 145
3. Rose Peers Pickernell
   Petitioner in Case 145
   Married to Nathan Pickernell, Allotted on Quinault Reservation

titioners clearly come within the terms and conditions of the stipulation (R. 421) to the effect that Lower Chehalis are entitled to allotment on the Quinaielt Reservation. An additional fact in this case is that the husband of Rose Peers Pikernoll, a petitioner herein, is an allotted Quinaielt Indian (R. 520).

CASE 154

Mary Francis Provoe, Laura M. Brown, Frank M. Provoe, et al., petitioners, claim that they are of the Upper Chehalis tribe. We are including herein a family tree of the Provoe family which will show the ancestry far beter than we could explain it. This chart, as well as the other charts herein, is fully borne out by the record in these cases.

Mary Francis Provoe, petitioner, is probably, strictly speaking, a Chehalis Indian. She was married to David Provoe, a Cowlitz Indian. The children are therefore mixed Cowlitz and Chehalis. Mary Francis Provoe and a number of her children live on the little Chehalis Reservation near Oakville. Sarah Spencer, petitioner, a daughter of Mary Francis Provoe, lives at Moclips, just outside the Quinaielt Reservation (R. 597). All the petitioners were recognized by the Quinaielt Indians in the 1912 meeting as being Indians entitled to allotment (R. 587). Their names were upon

the roll until 1918 when they were dropped without notice.

These petitioners do not live on the very immediate coast of Washington. However, the Chehalis Indians at the time of the treaty and Executive Order were fish-eating Indians. The record shows that all of the Indians of Southwestern Washington were and are closely affiliated with the Quinaielts. These petitioners clearly come within the classification of tribes held entitled to allotment by the Solicitor for the Interior Department. On pages 324 and 325 of the record he states:

> "The more reasonable view is that only the Indians of the tribes or bands on the immediate coast of Washington and those affiliated therewith were contemplated."

The Provoes, furthermore, come within Superintendent H. H. Johnson's definition of fish-eating Indians of the Pacific Coast. Except Mary Francis Provoe, the petitioners are Indians on both sides of the family.

The Circuit Court of Appeals criticises the Provoes for applying for allotments as Quinaielt Indians inasmuch as David Provoe, the father, was a Cowlitz Indian, and Mary Francis Provoe, the mother, and petitioner, probably an Upper Chehalis. This criticism was entirely unwarranted. Petitioners had been recognized by the Quinaielt In-

FAMILY TREE
OF THE
PROVOE FAMILY Case No. 154

Mals-Kam-Kung
Black River Tribe
Upper Chehalis
Married to
Huck-Ki-seali
Upper Chehalis Tribe.
They had three children.

1. Sally
Full blood Indian woman of Black River or Chehalis tribe
Married to
John Kindred
a White man.
They had three children.

2. Lizzie or Kli-tum
had a daughter Anne

3. Maria or Mrs Kam-heal
Had a daughter

1. Mary Frances Provoe
Petitioner in Case 154
Married to
David Provoe
A Cowlitz Indian
They had eight children:

1. John W. Provoe - deceased
2. Laura M. Brown
3. Frank M. Provoe
4. Rosa M. Garrard
5. Sarah Spencer
6. Isabelle Rainey
7. William Provoe
8. Raymond Provoe

} Petitioners in Case No. 154.

2. Lafayette Kindred
Had three children:
Note: See Plaintiffs Exhibit "B" for Status of this man, being Case No. 12 Secretary's letter of September 2d, 1910.

1. Ida May Gill
2. Katie Thomas
3. Fannie De Lamater

All three children allotted on Quinaielt Reservation

3. Nancy

* Mrs Sampson Johns - Quinaielt Allottee
wife of Sampson Johns. Quinaielt Allottee

dians in 1912. The Department itself had referred to Lafayette Kindred, the brother of Mary Francis Provoe, as a Quinaielt Indian.

Plaintiff's Exhibit 15 contains a letter addressed to the Secretary of the Interior and signed by F. H. Abbott, Assistant Commissioner of Indian Affairs, dated September 24, 1910, approved by Frank Pierce, First Assistant Secretary of the Interior, file marks L5921, page 9, as follows:

> "Lafayette Kindred for his four children and one grandchild, Albert L., 16 years, Fannie J., 13, and Kate J. Kindred, 11, and Ida May Gill, 25, and her child Adaline May Gill, 11 months old.
>
> "*The applicant is a mixed blood Quinaielt Indian* and has resided near the reservation and has been associated and identified with the tribe for some years. He expresses the intention of making the reservation his permanent home." (Italics ours).

These petitioners are entitled to allotment under the Executive Order of November 4, 1873, and also under the Act of March 4, 1911.

VI.

CONCLUSION

There are but a few questions involved in these cases. The first and most important one is wheth-

er or not residence upon the Quinaielt Reservation or on one of the small executive order reservations is a prerequisite for allotment on the Quinaielt Reservation. This question is referred to in a number of places throughout the argument. The long established policy of the Department in granting allotments to non-reservation Indians and in telling the Indians that it would not be necessary for them to reside on the reservation in order to be allotted (R. 494, 495); the fact that many of the Indians of Southwestern Washington still make their living by fishing as they have since the earliest times—combined with the fact that the reservation set aside for them was not habitable until cleared—make the ruling of the Circuit Court of Appeals, on the question of residence, unreasonable and inequitable, and not in accord with the authorities.

The second question is: What tribes were (or are) affiliated with the Quinaielts and the Quileutes in the Treaty of July 1, 1855, and January 25, 1856, within the meaning of the Act of March 4, 1911? (Appendix F). This is important for the reason that, though many of the petitioners are descendants of Quinaielt Indians, others are mixed Quinaielt and Chehalis, Quinaielt and Chinook, Chehalis and Cowlitz, etc. They claim rights on the reservation, not only under the Executive Order of 1873 (Appendix C), but also under the Act

of March 4, 1911 (Appendix F). The trial court held that the Chehalis (Upper and Lower), the Chinook and Cowlitz tribes, which were present at the Cosmopolis negotiations in 1855, were the tribes affiliated with the Quinaielts and Quileutes in the treaty. As we have pointed out, this is the only possible construction that will reconcile the Acts and Executive Order of 1873—the long established policy of the Department and the early history of these remnant tribes. It is equitable, and in keeping with "the genius of our institutions," in that it in some measure recompenses the Indians of Southwestern Washington for the vast territory taken from them.

The final question is: Must the children of enrolled and allotted members of the Quinaielt tribe, or members of the tribes or bands for whom the reservation was set aside, be adopted into the Quinaielt tribe before they can be allotted? The very statement of the question would seem to answer it. The Department has heretofore never required the fish-eating Indians for whom the reservation was set aside and who, we thoroughly believe, were further provided for by the Act of March 4, 1911 (Appendix F), to be adopted into the Quinaielt tribe. The view that the children of enrolled and allotted Indians—who still continue to live in the ancient habitat of their tribes and bands—must be adopted is, as we have shown, not

only contrary to all previously held conceptions but it is also contrary to the rules and regulations of the Department itself.

It is not our intention to condemn or unnecessarily to criticise the Department of the Interior for refusing allotments to petitioners after having allotted several hundred other Indians in exactly the same situation. As we have said, the task of allotting this reservation has not been an easy one. In the first place, the Quinaielt Reservation is a large one. The Indians for whom it was intended are scattered over an extensive area. It would be impossible for an allotting agent to know personally all the Indians. There have been numerous groups to please. Some have felt that, in spite of the decision in the case of *Tommy Payne v. United States*, 264 U. S. 446, 284 Fed. 827, the reservation should not be allotted—or, at least, allotted as little as possible. The small group of Quinaielts who fish commercially in the Quinaielt River and who are able to live on the reservation have fostered this view. As we have said, they believe that much land will be left over after the allottment work is completed. This will be tribal property. When it is sold the money will be paid into a tribal fund and in the distribution of this fund the reservation group may be expected to receive the lion's share.

The Quinaielt Reservation is a long way from Washington, D. C. For its knowledge of the sit-

uation and for its knowledge likewise of the individual applicants, the Department has had to rely on information furnished by local agents, among whom constant changes were being made. In not all instances has this information been accurate. It is not strange that the Department's knowledge of the claims of petitioners was not as accurate as it might have been. It was for just such situations as this that Congress passed the Act of August 15, 1894 (28 Stat. L. 305).

It has been suggested that some of the petitioners, while not leaving their tribal habitat, have locally assumed the ways of the whites and, for that reason, have no equitable rights on the Quinaielt Reservation. An examination of the record will show that this contention was raised in the lower court in regard only to one or two groups of petitioners. Unfortunately, before the Circuit Court of Appeals, the impression was given that nearly all were subject to this criticism (if criticism it can be called). It is sometimes quite difficult to define an equitable right. The petitioners are the descendants of the remnant bands for whom the reservation was set aside. Their descent, their degree of blood and their mode of living differ in no way from those of several hundred other Indians who have already been allotted. The reservation is now being allotted. We know of no Indians who have greater rights, legal or equitable, to share in

this land-distribution than the petitioners in these suits.

We cannot better close this brief than by repeating the concluding paragraphs from our petition for writs of certiorari:

The petitioners are Indians and it is difficult for them to understand, or for counsel to explain to them, the ruling of the court which denies them allotments upon the Quinaielt Indian Reservation when they know that a large number of their neighbors and relatives, in exactly the same situation, have, without adoption and without prior residence on any reservation, been allotted upon the same reservation. The policy adopted and pursued by the Department has been that of allotting the Quinaielt Reservation, without the necessity of prior residence and without the necessity of adoption into the Quinaielt tribe, to the fish-eating Indians of Southwestern Washington, who are affiliated with the Quinaielts and Quillehutes in the Treaty of 1855 and 1856, in compliance with the Special Allotment Act of March 4, 1911, following the Solicitor's opinion and of allotting Quinaielt Indians who did not live upon a reservation. This course of dealing has placed a construction upon the Executive Order of November 4, 1873, and the Special Allotment Act of March 4, 1911, which these simple, unlearned fishermen should be permitted to rely upon, for

this court has frequently held that Indian laws and treaties should be construed, not according to the technical meaning of their words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Jones v. Meehan*, 175 U. S. 1. *United States v. Winans*, 198 U. S. 381.

We believe that the District Court, in dealing with the Quinaielt Indian Reservation and with the rights of petitioners to allotments on such reservation, was justified in following the opinion of the Solicitor for the Department of the Interior which that Department has consistently followed since 1916 and under which it has allotted upon the same reservation, since that time, seven-hundred to eight-hundred Indians, whose qualifications to receive allotments are exactly the same as are those of petitioners in these actions. We further believe that the construction placed by the District Court upon the Executive Order of November 4, 1873, and upon the Act of March 4, 1911, is the only one consistently sustainable with the previous and present policy of the Department of the Interior in dealing with this reservation. The District Court's interpretation of the meaning of the word "treaty" is the one which has been adopted and followed in the past by the officers of the Department of the Interior and it should not be abandoned now to the prejudice of these particular pe-

titioners. Although we realize the difficulties faced by the Department in this locality, we earnestly believe that the change of policy now sought to be imposed by the Department falls far short of of that essential good faith on the part of the United States, which is required in dealing with a class of people who have been more or less considered as wards of the Government and who, at least, so far as these rights are concerned, sustain that relationship now.

The decisions of the Circuit Court of Appeals are narrow and technical in the extreme. They are not in accord with the facts in the record. We respectfully urge that the judgments of the Circuit Court of Appeals be reversed and those of the District Court be affirmed.

OVERTON G. ELLIS,
A Member of the Bar of this Court,
Solicitor for Petitioners,
Tacoma, Washington

STUART H. ELLIOTT
H. G. ROWLAND
DIX H. ROWLAND
Counsel for Petitioners,
Tacoma, Washington

APPENDIX

A—TREATY WITH THE QUINAIELTS, ETC., 1855-1856:

"Article 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

"Article 6. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are will-

ing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable * * *"

(Indian Affairs Laws and Treaties, Kappler, Vol. 2, page 719, 12 Stat. 971).

B—ACT OF MARCH 3, 1871:

"No Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

(16 Stat. 566, R. S. 2079.)

C—THE EXECUTIVE ORDER OF NOVEMBER 4, 1873:

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians"—"and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory"—"be withdrawn from sale and set apart

for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast."

(Kappler, Ind. Laws & Treaties, Vol 1 (2nd Ed.), pp. 923-924.)

D—ACT OF FEBRUARY 8, 1887 (GENERAL ALLOTMENT ACT):

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they made reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provision of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the

rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

(24 Stat. 388) (25 U. S. C. A. 331).

E—ACT OF JUNE 7, 1897:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right."

(30 Stat. 90.) (25 U. S. C. A. 184).

F—ACT OF MARCH 4, 1911:

"That the Secretary of the Interior be, and is hereby authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians

in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-fifth, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes;

Provided, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed."

(36 Stat. 1345).

G—ACT OF JUNE 2, 1924:

"All Indians born within the territorial limits of the United States are declared to be citizens of the United States. The granting of citizenship to Indians shall not in any manner affect the right of any Indian to tribal or other property."

(c. 233, 43 Stat. 253).

H—SECTION 324 OF THE ALLOTMENT REGULATIONS 1904 OF THE INTERIOR DEPARTMENT:

"Under Section 324 of the Regulations, 1904, and amendments thereto, children born to properly enrolled members of the tribe are entitled to enrollment with their parent or parents. This includes cases where the mother is an Indian

woman married on or prior to June 7, 1897, to a white man and living apart from the tribe, and the mother was recognized by the tribe as belonging thereto by blood, or was so recognized at the time of her death. It is not essential to enrollment that the children be so recognized nor that they be born on the reservation or among the Indians."

Act of June 7, 1897 (30 Stat. 90); and Solicitor's opinion of June 16, 1924, in the case of *Addie Prickett et al* (50 L. D., 554).

I—LETTER FROM THE COMMISSIONER OF INDIAN AFFAIRS UNDER DATE OF JANUARY 19, 1914:

"M. Peter E. Jackson,

"Port Gamble, Wash.

"

"As delegates of the tribes, these two Indians were further advised that under the general allotment act we are confined to a given number of acres of agricultural or grazing lands, and that such law did not contemplate the allotment of lands chiefly valuable for timber purposes; that timber valuable for commercial purposes was regarded as a tribal asset, to be administered for the benefit of the tribe at large rather than given to individual Indians by an allotment of land in severalty. It was

stated, further, that the office hoped to market this timber at a satisfactory price, and, when the timber had been removed, to allot the lands to Indians then found entitled, according to their character and value for agricultural and grazing purposes.

"Inadequate transportation facilities within and adjacent to the Quinaielt Reservation renders it difficult to find a ready and satisfactory market for the valuable timber there, and until these conditions are improved, or until the price of lumber per thousand feet increases materially, it is doubtful whether it would be wise to dispose of this timber in the immediate future. If by holding on for two or three years longer the price per thousand feet can be doubled, it will augment greatly the income of the Indians from this tribal asset.

"Allotments have heretofore been made to some 690 Indians within the Quinaielt Reservation, covering, in the aggregate, some 54,989 acres. A special allotting agent was on this reservation with a view of continuing the work there, but owing to the number of Indians entitled, and the fact that practically all the agricultural and grazing lands had theretofore been allotted, it became necessary to suspend

field operations until the timber on the tribal lands can be disposed of.

" . . . . . .

"(Signed) E. B. MERITT,
"Assistant Commissioner."

J—OPINION OF HONORABLE JAMES M. DIXON, FIRST ASSISTANT SECRETARY OF THE INTERIOR, IN CASE OF FRANCIS C. MOUNTS, ET AL, V. THE UNITED STATES (No. 385 EQUITY, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION):

Address Reply to
"The Attorney General
and refer to Initials and Number:
SWR-M
90-2-11-143 A. L.

RECEIVED
Office of U. S. Attorney
Nov. 6, 1929.
Seattle, Wash.
Ref. to PCR:FEB

DEPARTMENT OF JUSTICE

Washington, D. C.
November 1, 1929.

Anthony Savage, Esq.,
United States Attorney,
Seattle, Washington.

Re: FRANCIS C. MOUNTS ET AL, v. UNITED STATES, No. 385 Equity.

Sir:

There is transmitted herewith copy of a letter dated October 21, 1929, from the First Assistant Secretary of the Interior, relative to the above-entitled matter, which letter is self-explanatory.

As you will observe, the Interior Department has arrived at the conclusion that the plaintiffs in this case are entitled to enrollment and allotment upon the Quinaielt Indian Reservation. In view of this, it is suggested that you proceed no further in the defense of this case, and close the matter in your file.

Respectfully,

For the Attorney General,

(Signed) SETH W. RICHARDSON
Seth W. Richardson
Assistant Attorney General.

Enc. 59257

RECEIVED
Office of U. S. Attorney
Nov. 8, 1929,
Tacoma, Wash.
Ref. to .....

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Oct. 21, 1929

The Honorable
The Attorney General.

My dear Mr. Attorney General:

Further reference is made to your letter of June 21, 1929, transmitting for a report a photostatic copy of the bill of complaint in the case of *Francis C. Mounts et al v. the United States*, No. 90-2-11-743, in the United States District Court for the Western District of Washington, Southern Division.

On page 2 of the report to your Department it was stated that further facts would be obtained from the agency relative to the rights of the plaintiffs in this suit, and if it is found that they are entitled to the rights sought a recommendation would be made that the United States District Attorney be authorized to end the suit by stipulation.

Investigation of this matter develops the fact that Frank Mounts, the father of the plaintiffs, was enrolled by adoption and his enrollment was approved August 30, 1909. The oldest of the plaintiffs is 19 years of age. It is clear, therefore, that all the plaintiffs were born after the

adoption of their father into the Quinaielt Tribe of Indians. *It further appears that these people have never resided upon the Quinaielt Reservation.* However, it further appears that the father has never abandoned his tribal affiliation as he has always taken an active part in tribal affairs and often, though his residence is away from the tribe and his wife is a white woman, he has held tribal office and is now Vice President of the Quinaielt tribal council.

In view of the fact that the father of these children does not appear to have abandoned his tribal relations as shown by his position as a tribal officer, these children are entitled to enrollment and allotment on the Quinaielt Indian Reservation. It is therefore recommended that the proper United States District Attorney be instructed to take appropriate action to end the litigation already commenced in this case.

Had an application been properly made on behalf of these children and forwarded to this Department with a statement of all the above facts there would have been no necessity for the institution of a suit in this case.

A copy of this letter is being transmitted to

the Superintendent Taholah Indian Agency as instructions to enroll and allot these plaintiffs.

Very truly yours,

(Signed) JAS. M. DIXON,

First Assistant Secretary

Filed in the United States
District Court, Western District
of Washington, Southern Division,
November 26, 1929.
Ed M. Lakin, Clerk
By E. Redmayne, Deputy.